Supreme Court of the United States

OCTOBER TERM 1946

No. 1403 99

ARMAND ROBICHAUD,

Petitioner,

v.

DANIEL J. BRENNAN, Judge of Essex County Court of Common Pleas, State of New Jersey, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY, AND BRIEF IN SUPPORT THEREOF

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Counsel for Petitioner.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Armand Robichaud, of Glen Ridge, Essex County, New Jersey, respectfully presents this petition for a writ of certiorari to review the final decision of the Court of Errors and Appeals of the State of New Jersey, rendered and filed April 24, 1947, which affirms the judgment of the New Jersey Supreme Court entered October 28, 1946, upholding dismissal of writ of habeas corpus issued by Daniel J. Brennan, Judge of Essex County Common Pleas Court, and remanding petitioner to the custody of the Sheriff of Essex County for extradition to the State of Michigan.

Summary and Short Statement of the Matter Involved

On June 5, 1944, the Governor of Michigan issued a requisition upon the Governor of New Jersey requiring the petitioner to be apprehended and delivered to the properly designated Michigan authorities.

On August 29, 1944, the Governor of New Jersey issued a warrant of rendition, as a result of which the prisoner was apprehended and taken into custody.

Thereafter, a Judge of the Essex County Court of Common Pleas granted petitioner's prayer for relief by issuing a writ of habeas corpus in the usual form, whereby the validity and legality of the petitioner's detention were raised.

Following hearing on the writ before the Judge of the Essex County Common Pleas, the writ of habeas corpus was discharged. Order carrying that conclusion into effect will be found in the record at page 163.

Opinion of the Judge of the Pleas will be found at page 140 of the record.

Upon the entry of the order by the Judge of the Pleas a writ of certiorari was allowed by New Jersey Supreme Court to review its validity.

Having found the said order valid the writ was dismissed. The opinion of the New Jersey Supreme Court will be found at page 203 of the record.

The decision of the New Jersey Court of Errors and Appeals, rendered and filed as stated on April 24, 1947, affirms the judgment of the New Jersey Supreme Court and the opinion of that court.

It is this last mentioned decision of the New Jersey Court of Errors and Appeals affirming the judgment of the New Jersey Supreme Court from which your petitioner seeks review.

Jurisdictional Statement

The jurisdiction of this court is invoked under U. S. Code, Title 28, Section 344(b) (Judicial Code, Section 237 amended).

Questions Presented

1. Did the "warrant" authenticated by the Governor of Michigan as the basis of the demand for Petitioner's custody (being the only document certified as authentic) comply with the requirements of 18 U. S. C. A., Section 662, that an authenticated indictment, or an affidavit, be produced before the chief executive of the asylum state?

2. Was the constitutional guaranty that Petitioner should not be deprived of his liberty without due process of law violated by the action of the courts of the State of New Jersey in dismissing writ of habeas corpus granted to Petitioner and remanding him to the custody of the Sheriff of Essex County, New Jersey?

Reasons Relied on for the Allowance of the Writ

1. The authorities of the demanding state failed to comply with the Act of Congress (18 U. S. C. A., Sec. 662, *et seq.*) requiring production before chief executive authority of the asylum state of a copy of an indictment found, or an affidavit made, before a magistrate of the demanding state, charging the person demanded with having committed a crime, certified as authentic by the Governor of the demanding state.

2. Proceedings taken in the state of New Jersey failed to comply with the extradition statutes, both of New Jersey and Michigan, which two states have adopted the Uniform Extradition Act in substantially the same form, in that

(a) Warrant for arrest of petitioner was the only document certified by the Governor of the demanding state as authentic;

(b) All of the miscellaneous documents which were attached to the warrant (but which were not authenticated by the Governor of the demanding state) came into existence upon various dates after the issuance of the warrant ranging in time from 29 days to 31 days thereafter;

(c) Hence, at the time of the issuance of the warrant there was not even in existence an affidavit made before a magistrate of the demanding state charging petitioner with the commission of a crime.

3. The decision of the New Jersey Court of Errors and Appeals is a mere *pro forma* affirmance adopting the opinion of the New Jersey Supreme Court, which will be found at page 203 of the record. Such decision is in complete disregard, not only of the requirement of the Act of Congress referred to, but as well to the requirements of the Uniform Extradition Act as adopted by both the states of Michigan and New Jersey.

4. The proceedings taken in and by the said courts of the State of New Jersey deprives Petitioner of his liberty without due process of law contrary to the provisions of the constitution of the United States.

WHEREFORE, your petitioner respectfully prays that writ of certiorari issue to the New Jersey Court of Errors and Appeals, and submits his brief in support of his petition.

Dated: May 23, 1947.

Respectfully submitted,

THOMAS MCNULTY,
Counsel for Petitioner.

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Respondents.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Reference is made to the foregoing petition for a summary statement of the matter involved and a jurisdictional statement.

The opinion of the New Jersey Supreme Court is reported in 134 N. J. L. 532; 49 Atl. (2d) 287, and is printed in the record at page 203.

The opinion of the New Jersey Court of Errors and Appeals is not yet reported in the state reporting system. It is a formal adoption of the opinion of the New Jersey Supreme Court, and is printed in the record at page 217.

Facts

On June 5, 1944, the Governor of Michigan issued a requisition upon the Governor of New Jersey requiring

the appellant to be apprehended and delivered to the properly designated Michigan authorities.

Attached to the requisition is a series of papers.

"Application for Requisition" addressed to the Governor of Michigan, by Victor C. Anderson, prosecuting attorney of Ingham County, undated; record, page 18.

Warrant issued May 2, 1944, by Leland W. Carr stated to be "Circuit Judge acting under Sections 17217 and 17218 Compiled Laws of Michigan for 1929 and Acts Amendatory thereto" found at page 34 of the record;

Authentication of warrant signed by the Governor of Michigan, and dated June 5, 1944, found at page 17 of the record.*

Affidavit of Charles F. Hemans dated June 1, 1944, page 21 of the record.

Certificate of Leland W. Carr, Circuit Judge, dated June 2, 1944, page 32 of the record.

Examination of and testimony by the witness Hemans taken before Judge Carr May 31, 1944.

Affidavit of Victor Anderson, prosecuting attorney of Ingham County, dated June 2, 1944.

All of such four documents, or exhibits, are antedated by the warrant by various periods ranging from twenty-nine days to thirty-one days.

Therefore, at the time of the issuance of the warrant there was no affidavit in existence so far as the requisition upon the Governor of New Jersey discloses, upon which the warrant for the apprehension and rendition of the appellant was issued.

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* It will be observed that the authentication is limited to the *warrant* just previously referred to. No other document forming part of the requisition is authenticated by the Governor of Michigan.

On August 29, 1944, the Governor of New Jersey issued a warrant of rendition, as a result of which the prisoner was apprehended and taken into custody.

Thereafter, a Judge of the Essex County Court of Common Pleas granted appellant's prayer for relief by issuing a writ of habeas corpus in the usual form, whereby the validity and legality of the appellant's detention were raised.

Following hearing on the writ before the Judge of the Essex County Common Pleas, the writ of habeas corpus was discharged. Order carrying that conclusion into effect will be found in the record at page 163.

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Upon the entry of the order by the Judge of the Pleas a writ of certiorari was allowed by the Court below to review its validity.

Having found the said order valid, the writ was dismissed. The opinion of the New Jersey Supreme Court will be found at page 203 of the record.

On appeal to the New Jersey Court of Errors and Appeals that Court affirmed the Court below by adopting its opinion.

POINT I

Failure to Comply with Federal Statute.

It cannot be gainsaid that the appellant, by the recitals contained in warrant (Record, p. 34) is suspected of participating in the commission of a serious offense—bribing of members of the legislature of the state of Michigan; however, the appellant is a resident of the State of New Jersey, and has been such for the past 10 years. It is

his right to remain in his domicil unmolested and free from attempted interference with his liberty, unless the essential elements and requirements of the extradition statutes are strictly followed.

The subject of interstate rendition has its origin in the Constitution of the United States.

Article 4, Section 2, Clause 2, of the United States Constitution provides:

> "A person charged in any State with treason, felony, or other crime who shall flee from justice and be found in another state, shall on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime."

Because of an opinion rendered by Attorney General Randolph that the foregoing article of the Constitution was not self-executing, chiefly because it provided no machinery for its execution, the Congress in 1793 legislated on the subject. Such legislation may now be found in 18 U. S. C. A. §§ 662 *et seq.*

Section 662 of such Title provides as follows:

> "§ 662. FUGITIVES FROM STATE OR TERRITORY. Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person had fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or

> to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing and transmitting such fugitive to the State or Territory making such demand, shall be paid by such State or Territory. (R. S. § 5278.)"

See *Ex parte Kentucky* v. *Dennison*, 24 How. 66, 104; 16 L. Ed. 17, 728; also *Hyatt* v. *New York, ex rel. Corkran*, 188 U. S. 691.

There is a uniformity of decision by the courts of the United States that there shall be a formal accusation under oath of a crime having been committed in the demanding state. In *Roberts* v. *Reilly*, 116 U. S. 80, 6 S. Ct. 291, 299; 29 L. Ed. 544, the court lays down the general qualifications which must be met before extradition can be permitted. In the words of the court:

> "The act of congress (section 5178, Rev. St.) makes it the duty of the executive authority of the state to which said person has fled to cause the arrest of the alleged fugitive from justice, whenever the executive authority of any state demands such person as a fugitive from justice, and produces a copy of an indictment found, or an affidavit made, before a magistrate of any state, charging the person demanded with having committed a crime therein, certified as authentic by the governor or chief magistrate of the state from whence the person so charged has fled. It must appear, therefore, to the governor of the state to whom such a demand is presented, before he can lawfully comply with it—*First*, that the person demanded is substantially charged with a crime against the laws of the state from whose justice he is alleged to have fled, by an indictment or an affidavit, certified as authentic by the governor of the state making the demand; and *second*, that the person demanded is a fugitive from justice of the state the executive authority of which makes the demand."

See also:

In re Strauss (1905), 197 U. S. 324, 25 S. Ct. 535, 49 L. Ed. 774;
Pierce v. *Creecy* (1908), 210 U. S. 387, 28 S. Ct. 714, 52 L. Ed. 1113;
Compton v. *Alabama* (1909), 214 U. S. 1, 29 S. Ct. 605, 53 L. Ed. 885.

In two later day lower court decisions, *Ex parte Nash* (1930), 44 F. (2d) 403, and *United States* v. *Meyering* (1934), 75 F. (2d) 716, 718, the views of this court are reiterated and would seem to be the law of today.

It is interesting to note that in the *Meyering* case the Circuit Court of Appeals for the 7th Circuit, in discharging the prisoner detained for extradition upon a murder charge, held that the Federal Statute makes no provision for the certification of a *warrant*. The court said:

> "The certification of the warrant is not a sufficient compliance with the statute (citing cases) * * * *The statute is one involving the substantial rights of citizens and its essential elements must be strictly followed (citing cases). Only by faithfully following the provisions of the statute may a person be lawfully deprived of his liberty and extradited from an asylum state to another state, there to be tried for the commission of a crime. The alleged fugitive has a right not to be imprisoned or dealt with by states in disregard of those safeguards provided by the constitution of the United States.*" (Italics ours.)

POINT II

Failure to comply with extradition statutes of New Jersey and Michigan.

The Uniform Extradition Act has been adopted by both states in substantially the same form. In both of them, to have a valid demand for extradition, the demand, which is required to be in writing, must be accompanied by

(1) A copy of the indictment found or by information supported by affidavit in the state having jurisdiction of the crime; or

(2) A copy of any affidavit made before a Magistrate there, together with a copy of any warrant which was issued thereupon.*

The indictment, information or affidavit must *substantially charge the person demanded with having committed a crime under the law of that State.*

The copy of the *indictment, information* or *affidavit* must be authenticated by the executive authority making the demand.

The Court below disposed of the matter by affirming the finding of the Judge of the Common Pleas, viz., the warrant took the place of an indictment, predicating its conclusion upon the fact that under the Code of Criminal Procedure of Michigan (3 Comp. Laws 1929 para. 17118; Stat. Ann. para. 28.843) the word "indictment" includes the words "information," "presentment," "complaint" and "warrant" and any other form of written accusation, citing following cases in support of its position *In re Watson*, 291 N. W. 652; *In re Petition for Investigation of*

* The warrant which is annexed to the requisition papers delivered to the Governor of New Jersey could not possibly have been issued on any of the affidavits annexed, as such warrant on its face shows it was issued long prior to the dates of the affidavits.

Recount, 258 N. W. 776; *People* v. *St. John*, 278 N. W. 754; *People* v. *Ewald*, 4 N. W. (2d) 456.

The Court below then proceeds to say:

> "The learned judge of the court below in passing upon this question held:
>
> '1. That it charges a crime against the petitioner and others in the manner provided by the laws of the demanding state;
>
> '2. That the charge is made by a duly constituted grand jury under the statute law of Michigan;
>
> '3. That such warrant as is now before the court is a sufficient instrument on which the petitioner could be apprehended and held for trial in the demanding state.'
>
> With these conclusions we agree. The warrant is, in effect, an indictment within the meaning of the extradition statute, is in compliance therewith and alleges an offense against the laws of the State of Michigan. The authorities in this State will not pass upon the validity of a complaint filed in another jurisdiction. In the matter of Peter Voorhees, 32 N. J. L. 141; In re Williams, 101 N. J. Eq. 75."

That the conclusions reached by the Court below and by the Judge of the Essex Common Pleas are erroneous is established by the following:

(a)

The warrant plainly does not contain the necessary substantive elements of an indictment, most striking of which is the fact that a common law grand jury makes a formal charge of crime under oath.

An indictment is a written accusation against one or more persons of a crime or misdemeanor presented to or preferred *upon oath or affirmation* by a grand jury legally

convoked, Bouvier's Law Dictionary; 4 Blackstone's Commentary 299; Coke's Littleton 126; 2 Hale P. L. Cr. 152.

The instant warrant is not made under oath. Indeed, it is no more than an elaborate apprehension process. Examination of it (Record, p. 34) discloses that only in respect of the length and details of recitals does it vary from the common form of warrant issued to apprehend accused persons.

Whether the demand be in the form of an indictment or affidavit as required by the Federal Statute or information as added by the state statutes, the demand must substantially *charge* the person demanded with having committed a crime under the law of the demanding state. See R. S. 2:185-11.

Similar requirement exists in the Uniform Extradition Law as adopted by New Jersey and Michigan and also in the Federal Statute, Title 18, U. S. C. A., Section 662. However, in the instance of the Federal Statute the word "substantially" appears to have been omitted.

What do we find upon examination of the warrant under consideration here? It contains no more than the statement of a suspicion, viz.,

> *"There appears to me (Judge Carr) to be probable cause to suspect"* (italics ours)

that the named persons did commit the crime of conspiring to bribe members of the legislature of the State of Michigan, and therefore the Sheriff of Ingham County is directed to arrest the named defendants and bring them before Judge Carr to be dealt with according to law.

As we hereafter point out "to be dealt with according to law" means to have an examination in order to make it possible of determination by the Prosecutor of the County whether he should file an information against the defendants as a substitute for an indictment.

Contract the language of the warrant with that of a common law indictment as returned by the grand juries of New Jersey. (See Appendix 1.)

The New Jersey indictment *affirmatively charges* as a fact that the named defendant did commit the crime designated in the indictment. So far as the form of the two instruments is concerned, doubt and uncertainty no stronger than a suspicion characterize the warrant, whereas in the case of the common law indictment there is a definite affirmative charge against the defendant of the commission of a crime. While, of course, as the Court below said, "The authorities in this state will not pass upon the validity of a complaint filed in another jurisdiction" that is quite beside the question here, which is—Does this instrument satisfy the requirement of the Federal Statute and of the Uniform Extradition Act of both states, that the defendant, who is demanded, be CHARGED with the commission of a crime? We think not.

(b)

The Statutes of Michigan

Appended hereto are the pertinent sections of the Michigan Code of Criminal Procedure as found in the Annotated Statutes of Michigan which describe the procedure to be followed *as upon formal complaint* by the justice or judge, with whom complaint has been filed as a result of which he undertook an investigation. (See Appendix 2.)

We are particularly concerned with:

Section 17218 under which a warrant, such as we have in this case, is authorized to be issued;

Section 17196 providing for examination of the apprehended person;

Section 17205 requiring the magistrate before whom the apprehended person is arraigned under warrant so issued to be bound over to appear before the Circuit Court of such county, or any court having jurisdiction, for trial; and

Sections 17255 and 17256 requiring the prosecutor to file an information against the apprehended and accused person but which information may not be filed until after the accused has had a preliminary examination (unless waived). *A highly important portion of the section last referred to is that which provides that informations may be filed without such preliminary examination against fugitives from justice and any such fugitives against whom an information may be filed may be demanded in the same manner and the same proceedings may be had thereon as provided by law in like cases of demand upon indictment found.* (Italics ours.)

Those sections of the Michigan Statutes show that the procedure which, under the Code of Criminal Procedure, *must* be followed in Michigan, after a person has been arrested under a warrant issued by a so-called "one-man grand jury" to cause the apprehension of persons suspected of commission of crime, is as follows:

1. After his arrest the defendant must be brought before the Court.
2. The Court then sits as an examining magistrate; and
3. If the offense is bailable, the Court must admit him to bail.
4. Unless such examination is waived by the defendant, a date must be set for a public hearing, at which the people's witnesses must be examined in open court, and the defendant afforded a right of cross examination.

5. If it appears to the magistrate, after examination of the whole matter, that an offense not cognizable by a justice of the peace has been committed, and that there is probable cause for charging the defendant therewith, the magistrate must bind such defendant to appear before the Circuit Court for trial.

6. The magistrate must then certify and return all examinations and recognizance taken by him to the Clerk of the Circuit Court.

7. After such certificate and return is filed, the prosecuting attorney of the county must examine all the facts and circumstances connected with such preliminary examination, and if he is satisfied a crime has been committed, he, as informant, must sign and file an information.

8. If the prosecuting attorney determines that an information ought not to be filed, he is required to file a written statement to that effect together with his reasons for not filing it.

9. If the Court is not satisfied with such statement, he may direct the prosecuting attorney to file the proper information bringing the case to trial.

10. No information may be filed against any person charging crime, until after such person shall have had a preliminary examination before a magistrate, unless such examination be waived, except, however, *information may be filed without such examination against a fugitive from justice.*

11. Upon the filing of such information, the defendant is arraigned thereon, and required to plead thereto.

12. It is upon the information so filed that a person is brought to trial.

How can it be claimed that the instant warrant is "in effect an indictment within the meaning of the extradition statute (and) is in compliance therewith" in the face of the Michigan statute (Section 17256) specially providing in the case of "*fugitives from justice for the filing of an information without preliminary examination, and the bringing of extradition proceedings thereon in the same manner * * * as provided by law in like cases of demand upon indictment filed?*"

The foregoing provision is a clear recognition of the requirement of the Uniform Extradition Act, before the return of the fugitive may be demanded of the asylum state, an information must be filed or an indictment found. It is a complete answer to the view adopted by the Court below that "the grand jury warrant took the place of an indictment which, under the Code of Criminal Procedure, 3 Comp. Laws 1929, para. 17118 (stat. and para. 28.843) includes the words 'information, presentment, complaint, warrant, and any other formal written accusation.'" "Indictment" may include "warrant" by force of the statute; however, "warrant" does not include "indictment."

Under Michigan law a person can only be brought to trial either on an indictment found by a grand jury of not less than sixteen *or on an information filed by the prosecuting attorney of the county.*

(c)

Procedure of the Michigan Court in the Instant Case

Reference is made to Exhibit P-3 of September 21, 1944 (at the Habeas Corpus hearing), to be found on page 164 of the Record. It consists of two documents:

(1) A warrant issued by Judge CARR of the Circuit Court of Ingham County, Michigan, dated May 2, 1944; and

(2) Certificate by the same Judge of the proceedings had before him on the return of said warrant and which certificate is dated June 1, 1944.

The warrant forming part of the exhibit is identical with the warrant authenticated by the Governor of Michigan and forming the basis of the extradition proceedings.

It appears that a Judge of the Circuit Court for the County of Ingham, Michigan, conducted an inquiry under Sections 17217 and 17218 of the Michigan Compiled Laws (1929) in a proceeding entitled "In the Matter of the Complaint of Herbert J. Rushton, Attorney General for the State of Michigan, for a Judicial Investigation concerning certain Criminal Offenses."

In accordance with the Michigan procedure the Judge heard the testimony of witnesses and issued a warrant for the apprehension of fourteen named defendants, one of whom is the appellant. Approximately a month later the prosecutor obtained an affidavit from one Charles F. Hemans. This affidavit, along with the prosecutor's application for requisition, the warrant and its authentication, the examination of Hemans subsequent to the issuing of the warrant and its authentication and the affidavit of the prosecutor were sent to the Governor of Michigan. These papers, as well as the Governor's demand on the Governor of New Jersey, for the surrender of appellant, constitute the documents on which the extradition is sought.

The likelihood is that duplicate warrants were issued containing the names of all of the defendants. Possibly as many duplicate originals were made as there were defendants named in the warrant. However that may be, reference to the second of the two documents forming Exhibit P-3, being certificate of Judge Carr, shows (p. 173) that the accused persons were duly arrested by virtue of such war-

rant* and brought before him, whereupon the charge was read to the accused persons who did demand an examination and which examination after adjournment was had. Judge CARR then proceeds to certify (see p. 174) "that from the evidence offered and received on said examination it was made to appear to me, the said Circuit Judge, that said offense as set forth in the warrant was committed as charged therein, and that there was probable cause to believe that said accused persons to have been guilty thereof, whereupon I, the said Circuit Judge, acting as Magistrate as aforesaid, did order that said defendants, and each of them, *be bound over to the Circuit Court in and for the County of Ingham for trial and further proceedings in said cause * * * to answer to such information as might be filed against said defendants, or any of them for said offense* * * *. (Italics ours.)

Were the warrant, as the New Jersey Supreme Court found, "in effect an indictment within the meaning of the extradition statute (and) is in compliance therewith, what possible reason could there have been for the defendants, who were found in Michigan, to have been bound over to answer such information as might be filed against them. The procedure which was adopted and followed in respect of the thirteen companion defendants of the appellant unquestionably was in pursuance of, and under the statutory provisions to which reference has heretofore been made. They were bound over to answer such information because Sections 17205, 17255 and 17256 require that an examination be held as a condition precedent to the filing of an information except in the case of fugitives from justice, and that after the examination shall have been held, the accused, there being probable cause therefor, shall be bound over to appear before the Circuit Court to await the filing of information upon which he may be brought to trial.

* It is obvious that this statement is erroneous. The appellant was not found in Michigan and hence the extradition proceeding. There was an evident failure to exclude the appellant by name from the implication that all of the accused persons were duly arrested.

(d)

Undenied Testimony of Members of Michigan Bar

Upon the application for the writ to the New Jersey Supreme Court it was suggested that perhaps it might be well to take testimony of members of the Michigan Bar upon this particular point.

Thereafter a rule was obtained from the Chief Justice which required that more than the usual four days' notice be given of the intention to take proof; in fact, ten days' notice was given so that the authorities of Michigan might have ample time to be notified and arrange to appear. No one did appear at the taking of the testimony.

The petitioner called two of the outstanding members of the Michigan Bar, Glenn C. Gillespie of Pontiac, and David H. Crowley of Detroit. Both of the witnesses have been identified with the enforcement of the criminal law of that State.

Judge Gillespie functioned as Assistant Prosecutor and as Prosecutor of Oakland County for eight years in all. Following a short service as City Attorney of Pontiac, he was appointed Circuit Court Judge of the Sixth Judicial Circuit of Michigan. He served in that capacity for fifteen years, voluntarily retiring to resume the practice of law. The Circuit Court is the same court of which Judge CARR, who issued the warrant under attack, is a member—their jurisdiction having been in different counties.

Judge Gillespie was one of a committee charged by the Supreme Court of Michigan to formulate rules and regulations for the organization of the State Bar; he was one of the first Board of Commissioners of the State Bar, and Secretary of the organization, later becoming President.

As a member of the Michigan Judges' Association he collaborated in the preparation of the Michigan Code of Criminal Procedure, and also the Penal Code. His services were enlisted in the drafting of the so-called One-Man Grand Jury Statute, under which the present proceedings, now reviewed, were taken. He is also the author of a standard work on Michigan Criminal Law and Procedure, published by the Lawyers Co-operative Publishing Company of Rochester, and which work has been in general use in Michigan since its publication in 1940.

He had a great many occasions while Prosecutor to take proceedings under the Uniform Extradition Act; later when occupying the Bench frequently heard petitions for habeas corpus to test out the sufficiency of various papers used in connection with extradition, and after his retirement from the Bench for some time was legal Adviser to one of Michigan's Governors on applications for extradition from the State of Michigan.

Mr. Crowley served as Prosecuting Attorney for one of Michigan's counties for four years; following that he served as Assistant Attorney General of Michigan for four years. Then he returned to private practice. In October of 1935 he became Attorney General of that State, holding office until 1937. For a number of years he was a Regent of the University of Michigan. He has been engaged in the general practice of law in that State since 1905.

In the interest of brevity and to prevent burdening the record, only one of these gentlemen was examined in detail. Judge Gillespie covered the ground completely. While he was testifying Mr. Crowley sat in his presence and listened to his testimony. He corroborated Judge Gillespie's testimony.

In effect, Judge Gillespie testified as follows:

The only possible crime that could be charged by the warrant in question would be the offense of conspiracy as

it was known at the common law. The punishment prescribed for such offense is imprisonment for not more than five years, or a fine of not more than $2,000. That crime which calls for such punishment, is designated in the Michigan law as a felony, triable only in the Circuit Court of the county—or where some of the cities, such as Detroit, have a specially constituted court the offense would be triable in the Recorder's Court.

The steps necessary to be taken before the accused could be brought to trial are:

Under a warrant such as appears in the record in this case if the offender had been taken into custody he would be brought before the Judge who issued the warrant and would be entitled to a preliminary examination before the Judge unless such examination was waived. The purpose of that examination would be to determine, first, whether or not the offense had been committed and, secondly, whether or not there was probable cause to believe that the defendant had committed the offense. If the Judge so determined the offender would be bound over to the Circuit Court for trial.

Before the defendant could be put upon trial the prosecuting attorney of the county would have to file an information, which is a formal charge under oath setting forth the offense for which the accused is to be tried. Prior to the trial the prosecuting attorney is required to endorse on the information the names of all witnesses who are to be called at the trial, and none other may be called except the Court, in its discretion, might permit a late endorsement for good cause.

Having examined the particular warrant issued in this case Judge Gillespie testified that if the persons named in the warrant as being suspected of having committed a crime were apprehended and arraigned they would be bound over to wait the action of the Circuit Court of Ingham

County. If a trial were to be had it would only be as a result of an information under oath filed, as stated, by the prosecuting attorney of that county.

There was read to the witness the statement made by Mr. Sigler, which appears in the record at page 133. His answer was that it would be impossible under the Michigan law to place the respondents named in the warrant on trial in Michigan on that instrument. He said the prosecuting attorney would be obliged to conduct a preliminary examination before Judge CARR, or some other qualified Magistrate, and the Judge would have to make a finding that the offense had been committed, and that there was probable cause to believe that the defendants committed it. Then the Prosecutor would be obliged to file an information in the Circuit Court. Defendants would be tried on the information and not upon the warrant. Moreover, under the practice prevailing the defendant is called upon to plead only to the information. He is not required to plead to the warrant.

He characterized the warrant in this case as nothing more than process calling for the apprehension of the appellant, Robichaud, and the other defendants named therein.

Having had called to his attention Exhibit P-3, of September 21, 1944, being warrant issued for the apprehension of certain other defendants charged with the appellant here with having committed the same offense, Judge Gillespie pointed out that the procedure which had taken place upon the arrest of the defendants therein named was exactly as he stated it should be. He said, furthermore, that the two warrants, that is Exhibit P-3 of September 21, 1944, and the one which was sent to New Jersey for the apprehension of Robichaud, were identical.

Finally, Judge Gillespie testified that if the appellant, Robichaud, were delivered over to the Michigan authorities he could not be placed on trial on the warrant which is at

issue in this case. All that could be done with him was to treat him as Judge Carr had treated some of the defendants named in the other warrant, viz., to grant him a preliminary examination unless waived, and if there appeared probable cause for believing that Robichaud had committed the offense named in the warrant to bind him over to answer such information as might be filed against him. He said the law is well settled in Michigan that no information can be filed against a defendant until he shall have had, or waived, a preliminary examination, following which he is placed on trial for the offense which is charged in the information filed by the prosecuting attorney.

Mr. Crowley, when examined, testified that he had listened to the testimony of Judge Gillespie, and questions put to him and his answers. Mr. Crowley stated that he concurred in each of the statements with one minor exception which really was an error due to misuse of a term by the examining counsel.

It would seem to be conclusively established by the testimony of these two members of the Bar of Michigan that there is no possible foundation for the conclusion of the Court below that the warrant is in effect an indictment under the law of Michigan.

Neither the respondents, nor the State of Michigan, which is the real respondent, saw fit to offer any proof to refute the testimony of the witnesses Gillespie and Crowley.

(e)

Analysis of Michigan Cases Relied on by Court Below

The precise point with which we are dealing has not been passed upon by the Courts of Michigan; however, there are a number of decisions by the courts of that state indicating that a magistrate's warrant is not the equivalent of an indictment. See the following:

Yarner v. *People*, 34 Mich. 286; *People* v. *Sessions*, 58 Mich. 594, 596; 26 N. W. 291 (Sup. Ct. 1886); *People* v. *Bechtel*, 80 Mich. 623, 632; 45 N. W. 582 (Sup. Ct. 1890). Also, it is not a pleadable charge. *People* v. *Pichette*, 111 Mich. 461; 69 N. W. 739 (Sup. Ct. 1897); *People* v. *Kohler*, 93 Mich. 625; 53 N. W. 826 (Sup. Ct. 1892); *Hawkins* v. *Ralston*, 69 Mich. 63; 37 N. W. 45 (Sup. Ct. 1888).

The New Jersey Supreme Court in its decision (49 A. 2d, p. 289) adverted to the case of *People* v. *Kert*, 304 Mich. 148, 7 N. W. (2d) 251, 255, as authority for the proposition that the warrant in this case is equivalent to an indictment. The Supreme Court quoted the following from the Michigan case (49 A. 2d 289):

> ". . . that the investigation was assigned to a judge who acted as a one man grand jury; that there is probable cause to suspect the conspiracy, etc. The grand jury warrant took the place of an indictment, which under the Code of Criminal Procedure, 3 Comp. Laws 1929, sec. 17118, Stat. Ann. sec. 28.843, includes the words information, presentment, complaint warrant and any other formal written accusation."

In order to determine exactly what the Michigan court meant when it used these words it is necessary to consider what was before the Court for decision. The statute referred to will be found in the first chapter of the Criminal Procedure Act which deals with definitions. It must of necessity be general in nature and certainly will be controlled by an expression of contrary intent. It seems clear upon a reading of the cases, a consideration of the statutes regulating the charging of a crime by means of information and the specific provisions of the Uniform Criminal Extradition Act concerning the documents on which extradition may be based, that the Michigan legislature meant to distinguish between terms such an indictment, warrant, information, etc. It will be observed that Chapter VII, Section 2, of the Code of Criminal Procedure distinguishes between

indictments, informations and pre-trial proceedings. Section 7 provides that no grand juries shall be drawn unless the Judge of a competent court shall so direct by writing and filing with the Clerk of the Court; Sections 1 and 2 as a practical matter provide for the substitution of an information for an indictment. However, the indictment process may still be used.

The *Kert* case is one of a series of Michigan cases which talks generally of a "one-man grand jury." The Court refers to *People* v. *St. John*, 284 Mich. 24 as substantiating its position that the grand jury warrant took the place of an indictment. That case does not so hold and it is interesting to note the use of the term "so-called grand jury proceeding" (p. 27), when the Court refers to the propriety of such proceedings. At page 27 the Court, referring to this procedure, said:

> "The power thus granted the examining magistrate is *analogous* to the power of the old grand jury to make independent inquiry into offenses as to which no formal bill of indictment had been filed by the prosecuting officer." (Italics ours.)

Although the appellant feels that the *Kert* case, as applied in the present situation, is miscited, he believes that it correctly states the Michigan law for the proposition it was fundamentally concerned with. The primary question before the Court was whether the crime of perjury could be committed in a hearing before a Judge who sat as a Magistrate and Conservator of the Peace under the Michigan statutes. The defendant claimed the Judge was not acting in a judicial capacity at such a hearing and the testimony was not given in a legal proceeding. The Court held it was such a judicial proceeding in which perjury could be committed. *People* v. *St. John, supra,* referred to by the Court in the *Kert* case as authority for its position, also deals with the question whether a witness before the so-called one-man grand jury could be guilty of perjury and an evenly divided Court held he could be.

Other cases referred to in the Supreme Court's opinion as substantiating the *Kert* case are *In re Watson*, 293 Mich. 263, 291 N. W. 652; *In re Petition for Investigation of Recount*, 270 Mich. 328, 258 N. W. 776; *People* v. *Ewald*, 302 Mich. 31, 4 N. W. (2d) 456. The *Watson* case deals chiefly with the privilege of immunity and the right of a witness before a one man grand jury proceeding to refuse to answer incriminating questions. From this case it appears that a party can be guilty of contempt in such a hearing. The last two cases mentioned are primarily concerned with the jurisdiction of the Recorder's Court of the City of Detroit and in the Petition for Recount the Court says the proceeding is in the nature of an inquest.

So it appears that the procedure adopted by the Michigan legislature for the prosecution of criminal offenders has lead to much loose use of language. This was recognized in *In re Slattery*, 310 Mich. 458, where the Court refers to it as a "so-called one-man grand jury" and says at page 461:

> "An examination by the circuit judge, under the statutes above cited (reference is to same statutes on which instant case is based), is similar to that of a grand jury. It is popularly known as a 'one-man grand jury' proceeding. Even though this term may be a misnomer, it nevertheless is descriptive and we refer to the examination as that of a 'one-man grand jury.'"

Conclusion

The contention of the Petitioner is that under the Federal Constitution, the Federal Statute, and the Uniform Extradition Act of Michigan, the demanding state, and New Jersey, the asylum state, the fundamental requirements upon which a request for extradition can be based and honored are:

(a) An affidavit before a Magistrate, or

(b) An indictment, or

(c) An information.

Such requirements must be strictly observed and complied with. When the basic of any request is any one of these the only question remaining is does such basis instrument or precept substantially charge a crime committed in the demanding state. In the present cause the record does not show an affidavit before a Magistrate, or an information as the basis of the demand. In fact, nowhere throughout the proceedings have these fundamental prerequisites been contended to exist by the respondents. The contention has been solely that the "warrant" is an indictment under the laws of Michigan. The appellant's contention is and always has been, that it is not an indictment but nothing more than an interlocutory process employed during the investigation, by the Circuit Court Judge, to bring before him the parties suspected of having committed a crime. It is but a step in the inquisition which may, or may not, eventuate in the filing of an information by the prosecuting attorney. It is not in purpose or language an instrument or writ charging a crime. Such an instrument or precept is an information filed or an indictment returned by a grand jury.

Here we have neither—information nor indictment.

Wherefore, petitioner respectfully prays that this petition for a writ of certiorari to review the decision of the Court of Errors and Appeals of the State of New Jersey should be granted.

Respectfully submitted,

THOMAS MCNULTY,
Counsel for Petitioner.

APPENDIX 1

OYER AND TERMINER

TERM, A. D. 19

County, to wit:—The Grand Inquest of the State of New Jersey, in and for the body of the County of , upon their respective oath

PRESENT, That

late of the of in the said County of , on the day of in the year of Our Lord one thousand nine hundred and with force and arms, at the aforesaid, in the County aforesaid, and within the jurisdiction of this Court,
with a certain

which , the said in hands then and there had and held, in and upon one in the peace of God and of this State then and there being, did commit an assault with an intent the said then and there to kill, contrary to the form of the Statute in such case made and provided, and against the peace of this State, the government and dignity of the same.

And the Grand Inquest aforesaid, upon their oath aforesaid, do further

PRESENT, That the said

on the day of in the year

of our Lord one thousand nine hundred and

at the aforesaid, in the County of

aforesaid, and within the jurisdiction of this Court, in and upon one in the

peace of God and of this State, then and there being, an

assault did make, and , the said

then and there did beat, wound and

ill-treat and other wrongs, to the said

then and there did, to the great damage of the said

contrary to the form of the Statute in such case made and provided, and against the peace of this State, the government and dignity of the same.

Prosecutor of the Pleas.

APPENDIX 2

ABSTRACT OF THE PERTINENT SECTIONS OF THE PUBLIC LAWS OF MICHIGAN

Section 17217 (Sec. 28.943 of Mich. Stat. Anno.):

"Whenever by *reason of the filing of any complaint,* which may be on information and belief, any justice of the peace, police judge or judge of a court of record shall have probable cause to suspect that any crime, offense, misdemeanor or violation of any city ordinance shall have been committed within his jurisdiction, and that any person may be able to give any material evidence respecting such offense, such justice or judge in his discretion may, and upon the application of the prosecuting attorney or city attorney, in the case of suspected violation of ordinances, shall require such person to attend before him as a witness and answer such questions as such justice or judge may require concerning any violation of the law about which he may be questioned;" etc.

Section 17218 (Sec. 28.944 Mich. Stat. Anno.):

"If upon such inquiry the justice or judge shall be satisfied that any offense has been committed and that there is probable cause to suspect any person or persons to be guilty thereof he may cause the apprehension of such person or persons by proper process and, upon the return of such process served or executed, the justice or judge shall proceed with the case matter or proceeding in like manner *as upon formal complaint* * * * And in respect of communicating or divulging any statement made by such witnesses during the course of such inquiry, the justice, judge, prosecuting attorney or other person or persons who may, at the discretion of such justice, be admitted to such inquiry, shall be governed by the provisions of law relative to grand jurors."

Section 17196:

"*Examination; time, manner.* Sec. 4. The Magistrate before whom any person is brought on a charge of having committed an offense not cognizable by a justice of the peace, shall set a day for examination not exceeding ten (10) days thereafter, at which time he shall examine the complaint and the witnesses in support of the prosecution on oath in the presence of the prisoner, in regard to the offense charged and in regard to any other matters connected with such charge which such Magistrate may deem pertinent."

Section 17205:

"*Discharge of defendant; binding defendant over for trial.* Sec. 13. If it shall appear to the Magistrate upon the examination of the whole matter, either that no offense has been committed or that there is not probable cause for charging the defendant therewith, he shall discharge such defendant. *If it shall appear to the Magistrate* upon the examination of the whole matter, that an offense not cognizable by a justice of the peace has been committed and *there is probable cause for charging the defendant therewith, said Magistrate shall forthwith bind such defendant to appear before the circuit court of such county or any court having jurisdiction of said cause, for trial.*"

Section 17207:

"*Certification, return of examination and recognizance to trial court.* Sec. 15. All examinations and recognizances taken by any magistrate pursuant to any of the provisions of this chapter, shall be forthwith certified and returned by him to the clerk of the court before which the party charged is bound to appear, and if such magistrate shall refuse or neglect to return the same, he may be compelled forthwith by rule of the court, and in case of disobedience he may be proceeded against by attachment as for a contempt."

Section 17254:

"*Information; filing, signature, endorsement of names of witnesses.* Sec. 40. All informations shall be filed during term in the court having jurisdiction of the offense specified therein, after the proper return is filed by the examining magistrate by the prosecuting attorney of the county as informant; he shall subscribe his name thereto, and indorse thereon the names of witnesses known to him at the time of filing the same. Names of other witnesses may be endorsed before or during the trial by leave of the court and upon such conditions as the court shall determine."

Section 17255:

"*Investigation by prosecutor; statement of reasons for failure to file information; order of court for filing.* Sec. 41. It shall be the duty of the prosecuting attorney of the proper county to inquire into and make full examination of all the facts and circumstances connected with any case of preliminary examination as provided by law, touching the commission of any offense whereon the offender shall be committed to jail or become recognized or held to bail; and if the prosecuting attorney shall determine in any case that an information ought not to be filed, he shall make, subscribe and file with the clerk of the court a statement, in writing, containing his reasons in fact and in law, for not filing an information in such case and that such statement shall be filed at and during the term of the court at which the offender shall be held for appearance: *Provided*, That in such case such court may examine said statement, together with the evidence filed in the case and if, upon such examination, the court shall not be satisfied with said statement, the prosecuting attorney shall be directed by the court to file the proper information and bring the case to trial."

Section 17256:

"*Examination as condition precedent to filing of information; exception; demand for fugitive from justice.* Sec. 42. No information shall be filed

against any person for any offense until such person shall have had a preliminary examination therefor, as provided by law, before a justice of the peace or other examining magistrate or officer, unless such person shall waive his right to such examination: *Provided, however, that informations may be filed without such examination against fugitives from justice, and any fugitive from justice against whom an information shall be filed, may be demanded by the governor of this state of the executive authority of any other state or territory or of any foreign government, in the same manner and the same proceedings may be had thereon as provided by law in like cases of demand upon indictment filed.*"

APPENDIX 3

NEW JERSEY COURT OF ERRORS AND APPEALS

No. 14—February Term 1947

ARMAND ROCHIBAUD,

Appellant,

vs.

DANIEL J. BRENNAN, &c., *et al.*,

Respondents.

Argued Feb. 4, 1947—Decided

On appeal from Supreme Court, whose opinion is reported at 134 N. J. L. 532.

RICHARD J. FITZMAURICE (John Milton of Counsel) for the Appellant.

JEROME B. LITVAK, Special Deputy Atty Genl., for the Respondent (C. William Caruso, Special Asst. Prosecutor, of Counsel).

Per Curiam

The judgment under review herein is affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Donges in the Supreme Court.

"ENDORSED—Filed
Apr 24 1947
LLOYD B. MARSH
clerk"

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 403 99

ARMAND ROBICHAUD,

Petitioner,

v.

DANIEL J. BRENNAN, Judge of Essex County Court of Common Pleas, State of New Jersey, *et al.*,

Respondents.

ON APPLICATION FOR CERTIORARI TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

REPLY BRIEF.

THOMAS MCNULTY,
Counsel for Petitioner.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

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OCTOBER TERM 1947.

No. 1403.

ARMAND ROBICHAUD,

Petitioner,

v.

DANIEL J. BRENNAN, Judge of Essex County Court of Common Pleas, State of New Jersey, *et al.*,

Respondents.

REPLY BRIEF.

Statement.

The Opposition Brief first suggests a lack of jurisdiction. The contention is that "the only federal question that could possibly arise, was decided by construing Michigan criminal law in view of a liberal interpretation of the Congressional Act of 1793 (18 U. S. C. A. §662) necessitated by the language of the federal Constitution (Article 4, §2, Sub. 2)."[1]

The second point is that in any event there has been a compliance with the federal statute.[2]

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[1] Opposition Brief, p. 3.

[2] 18 U. S. C. A. §662.

I.

The judgment below of necessity involved a substantial and important constitutional and federal question.

At every opportunity in the three courts below and in this court, the petitioner has raised the federal question of whether or not there has been a compliance with the federal Constitution and the implementing federal statute.[3]

To meet the question thus raised the respondents take the position that the decision of the New Jersey courts that "the warrant is in effect, an indictment within the meaning of the extradition statute (and), is in compliance therewith * * *"[4] rested on non-federal grounds. The argument is that this conclusion could have been reached solely by the construction of the state statutes involved, chiefly those dealing with Michigan criminal law.[5] Consequently, the federal question though discussed was not necessary to a decision of the case.

The position urged by the respondents is based upon a misconception of the respective spheres of federal and state power. The states granted to the federal govern-

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[3] Essex County Common Pleas Record, p. 7; New Jersey Supreme Court, p. 157; New Jersey Court of Errors and Appeals, p. 214; in this court, p. 3 of Petition for Writ of Certiorari.

[4] New Jersey Supreme Court, Record p. 208; aff'd *per curiam* without opinion, New Jersey Court of Errors and Appeals, 135 Law 472, 52 Atl. 2d 697.

[5] An examination of the Michigan statutes annexed to both briefs and the record, pp. 190-193, will demonstrate that even as a question of state law the proposition that the warrant in this case is an indictment or equivalent thereto is unsound. The Michigan equivalent for an indictment is an information.

ment the right to legislate in extradition matters.[6] Power not granted by the states to the federal government, or power granted but not yet exercised by the federal government, may not be exerted by the states in conflict with the provisions of the federal Constitution and the federal statutes designed to effectuate it. In matters covered by the Federal Extradition Statute, Congress has preempted the field.[7]

An alleged fugitive has a constitutional right to resist any extradition except one in compliance with the constitution and the federal statute implementing it.[8] This is an important Constitutional and federal right of the petitioner here. It involves his right of personal liberty in its most complete sense. Since his right is federal he cannot be deprived of it either by state statutes or by the construction of state statutes.

The first questions to be resolved in any extradition case are whether the Constitution and the federal statute implementing it have been complied with. These questions precede and are paramount to any consideration of any state statute in aid of or supplementing the supreme law.[9] The Federal Extradition Statute requires, for the lawful honoring of a requisition for extradition, either—

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[6] United States Constitution, Article 4, §2, Clause 2; *Kentucky* v. *Dennison*, 24 How. 66; *Prigg* v. *Pa.*, 6 Pet. 539; 10 L. Ed. 1060; *Taylor* v. *Tainter*, 16 Wall. 366, 21 L. Ed. 287; *Appleyard* v. *Mass.*, 203 U. S. 222, 27 S. Ct. 122, 51 L. Ed. 161; *Illinois, ex rel. McNichols* v. *Pearl*, 28 U. S. Sup. Ct. 58, 52 L. Ed. 121.

[7] *Innes* v. *Tobin*, 240 U. S. 127, 36 S. Ct. 290, 60 L. Ed. 562; *Prigg* v. *Pa.*, *supra*; *Kentucky* v. *Dennison*, *supra*; *Mahon* v. *Justice*, 127 U. S. 700, 8 S. Ct. 1204, 32 L. Ed. 283; *Lascelles* v. *Georgia*, 148 U. S. 547, 13 S. Ct. 687, 37 L. Ed. 549.

[8] *Hyatt* v. *New York*, 188 U. S. 691, 719, 23 S. Ct. 456, 47 L. Ed. 657; *Burton* v. *New York Central & H. R. R. Co.*, 245 U. S. 315, 38 S. Ct. 108; *South Carolina* v. *Bailey*, 289 U. S. 412, 53 S. Ct. 667; *Compton* v. *Alabama*, 214 U. S. 1, 29 S. Ct. 605, 53 L. Ed. 885, 16 Ann. Cas. 1098.

[9] *State* v. *Parrish*, 242 Ala. 7, 5 So. (2d) 828.

1. A copy of an indictment; or

2. An affidavit charging the commission of a crime under the laws of the demanding state.

The petitioner complains of the fact that in this case neither of the alternative papers required by the federal statute were produced or authenticated. No narrow technical complaint based upon the sufficiency of the papers is being made. Compliance with the federal Constitution and the federal statute are the basic questions that must be resolved in every extradition case.

The solution of these federal questions cannot be avoided by interpretation or construction of state statutes. "The object of the present judiciary act was * * * to prevent courts of the several states from impairing or frittering away the authority of the federal government, by giving a construction to its statutes adverse to such authority."

Missouri v. *Andriano*, 138 U. S. 496, 499, 11 S. Ct. 387.

"The power given to the Supreme Court by this act of Congress was intended to protect the general government in the free and uninterrupted exercise of the powers conferred on it by the Constitution, and to prevent any serious impediment from being thrown in its way while acting within the sphere of its legitimate authority."

Bank v. *Griffin*, 14 Pet. 56, 58, 10 L. Ed. 352.

Since the statute here, the Uniform Extradition Act is in force in 32 states, the problem is an extremely important one, and likely to be recurring. It is a basic one of subordinating and adjusting the power of states to paramount

authority of the federal government. The federal and state courts are now in sharp and unseemly conflict on this point.[10]

The state's first duty is to obey the federal Constitution and the federal statutes enacted pursuant thereto. The state cannot so construe a State Extradition Statute and criminal statutes of a sister state so as to effectively circumvent, impair or fritter away the plain requirement of the Federal Extradition Act. The Federal Extradition Act requires a duly authenticated affidavit or an indictment.[11] In enacting these minimum requirements Congress has preempted the field and the federal statute and authority are controlling and exclusive of any power or authority reserved by the states.

The court should grant the writ because:

1. The judgment below deprives the petitioner of his Constitutional and federal right to remain in his domicile unless extradited in accordance with the provisions of the federal Constitution and the implementing federal statute.

2. The honoring of the extradition requisition in this case would deprive the petitioner of his personal liberty without due process of law and without compliance with the Federal Extradition Act.

3. The scope of the accommodation of the reserved power of the state to the federal exercise of power is presented.[12]

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[10] *Cf. U. S.* v. *Meyering*, C. C. A. 7th, 75 F. (2d) 716, holding a warrant insufficient after the Supreme Court of Illinois had held the same warrant sufficient. *People ex rel.* v. *Meyering*, 356 Ill. 210, 190 N. E. 261.

[11] 18 U. S. C. A. §662; *Roberts* v. *Reilly*, 116 U. S. 80, 6 S. Ct. 291, 29 L. Ed. 544.

[12] The Uniform Extradition Act which are the statutes of New Jersey (N. J. R. S. 2:185-9 *et seq.*) and Michigan (Mich. Stat. Ann. Cum. Supp. §28.1281-1 *et seq.*) involved in this case is in force in 32 states with substantially the same provisions as exist in New Jersey and Michigan, U. L. A. Vol. 9, 1947 Supp. 27.

4. The state court has undertaken to construe the Federal Extradition Statute in a manner not heretofore passed upon by this court. The matter is of such sufficient importance in the administration of criminal extradition as to warrant this court finally settling this question.[13]

II.

The federal statute was not complied with.

A.

The Warrant in This Case Is Not an Indictment.

The Opposition Brief repeatedly refers to "one man grand jury" "judge sitting as a one man grand jury" "grand jury warrant", etc. These characterizations appear on almost every page of the Opposition Brief. Neither the characterization nor the language appear in the Michigan statutes. It is a newspaper term. The Supreme Court of Michigan has demonstrated its inaccuracy.[14]

This is an effort to give the warrant issued by the Circuit Court Judge in this case a dignity and authority that it does not have in Michigan.

The requisition papers contain no authenticated affidavit as required by the federal statute.[15] Those papers merely authenticate the warrant. Lacking the requisite affidavit, the Michigan authorities were driven to the claim that

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[13] See Note 12 *ante*.

[14] *In re Slattery*, 310 Michigan 458.

[15] This is required by the federal statutes as written and as construed. *Roberts* v. *Reilly*, 116 U. S. 80, 6 S. Ct. 291, 29 L. Ed. 544. *Ex Parte Hart* (C. C. A. 4th), 63 Fed. 249. Authentication is also required by Section 3 of the Uniform Extradition Act.

the warrant was an indictment or substantially so. The uncontradicted evidence in the case on the Michigan law is to the effect that the warrant authenticated here does not materially differ from the usual warrant for arrest.[16] Such a warrant was rejected by the Circuit Court of Appeals, 7th Circuit, as a sufficient basis for extradition in *U. S.* v. *Meyering*, 75 F. (2d) 716. The court felt the authenticated warrant so patently defective that even though the charge was murder and the highest court of Illinois had refused to discharge the petitioner on a habeas corpus he had prosecuted through the state courts, it nevertheless discharged him.

An examination of the warrant will demonstrate that it is nothing more than a warrant for the apprehension of the accused and is not supported by the oath of anyone. An indictment is a formal accusation of crime under oath. Upon a criminal trial after indictment, the indictment constitutes the basis of the charge upon which the accused is tried. The statutes in the appendices to the petitioner's and respondent's brief demonstrate that under the laws of Michigan the accused is not tried upon the warrant that was authenticated here. These statutes support in every detail the testimony on behalf of the petitioner as to the Michigan law.[17] After his arrest upon the warrant a formal charge by way of information is filed to which the accused pleads and upon which he is tried. In addition thereto the Michigan laws authorize a filing of an information without examination against a fugitive from justice.[18]

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[16] Record 190-193.

[17] Record 190-193.

[18] Public Laws of Michigan, §17256, pp. 33, 34 of Petitioner's Main Brief.

B.

No Affidavit Complying with the Federal Statute Was Produced.

Before an affidavit can be used as a basis for extradition, it must be authenticated. Here, none of the affidavits are authenticated as required by the federal statute.[19] In spite of the lack of authentication the respondent claims the affidavits in this case comply with the federal statute. No reason is assigned why they were not authenticated.

This is not a mere technical right but a substantial protection to the petitioner's constitutional right not to be extradited except in accordance with the provisions of the federal Constitution and implementing statute. No case can be found where neither a complaint supported by an affidavit nor an indictment or information was not authenticated. Here, neither of the alternative papers which is required by the federal statute was furnished and authenticated with the requisition.

Respectfully submitted,

THOMAS MCNULTY,
Counsel for Petitioner.

[19] This is required by the federal statutes as written and as construed. *Roberts* v. *Reilly*, 116 U. S. 80, 6 S. Ct. 291, 29 L. Ed. 544. *Ex Parte Hart* (C. C. A. 4th), 63 Fed. 249. Authentication is also required by Section 3 of the Uniform Extradition Act.

In the Supreme Court of the United States

October Term 1947

No. 99

Armand Robichaud, **Petitioner,** **v.** **Daniel J. Brennan,** Judge of Essex County Court of Common Pleas, State of New Jersey, et al., **Respondents.**	**On application for certiorari to the Court of Errors and Appeals of the State of New Jersey.**

Brief Opposing Petition for Certiorari

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FRANKLIN DE KLEINE COMPANY, STATE PRINTERS, LANSING, MICHIGAN

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In the Supreme Court of the United States

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Brief Opposing Petition for Certiorari

I

Reference to official report of opinions delivered in courts below.[*]

The opinion (218) of the court immediately below, which affirmed the judgment of the New Jersey Supreme Court for the reasons expressed in the opinion of the latter, has not been officially reported, though it appears in 52 A 2d, 697.

The opinion of the New Jersey Supreme Court, which dismissed the writ in certiorari proceedings brought by the

[*]
Unless otherwise plainly indicated by the context, numbers in parentheses throughout this brief, refer to pages of the printed record of the court below.

petitioner against the respondent judge to review his action in dismissing a writ of habeas corpus previously allowed (4) to test the legality of petitioner's extradition to Michigan (16-60) and his detention under a rendition warrant (61-62) executed by the Governor of New Jersey, is officially reported in 134 N.J.L. 532 (49 A. 2d 287).

The opinion of the respondent judge of common pleas,[1] is not officially reported but it appears (140-162) in the printed record.

II

Counter-Statement concerning jurisdiction.

Counsel for petitioner states (petition, p. 3) without any elaboration, that the jurisdiction of this Court is invoked under § 237 of the Judicial Code as amended (28 USCA § 344 [b]).

It is our position that, while the Federal Constitution[2] commands each State to honor a demand of the executive authority of a sister State for the rendition of a fugitive from justice, and although the Congress is said to have implemented this constitutional provision by its Act of 1793,[3] nevertheless, the record at bar discloses that sub-

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[1] Since it so clearly defines the issues, and since each decision of the reviewing courts accepts its rationale, the opinion of Judge Brennan (140) of the Essex county court of common pleas, is basic.

[2] Constitution of the United States, article 4, § 2, subdivision (2).

[3] 18 USCA § 662.

stantial, purely local, nonfederal grounds underlie each decision of the state courts below; and that each opinion rests squarely on a judicial interpretation of New Jersey[4] and Michigan [5] statutes. We contend that the only federal question that could possibly arise, was decided by construing Michigan criminal law in view of a liberal interpretation of the congressional Act of 1793 (18 USCA § 662) necessitated by the language of the Federal Constitution (art. 4, § 2, sub. 2).

We, therefore, respectfully suggest that there is a reasonable doubt of this Court's jurisdiction.

III

Counter-Statement of the Case.

The conflict in the courts below over extradition proceedings (16-62) for the return of petitioner from the asylum State of New Jersey to the demanding State of Michigan, revolved closely about Michigan's 'one-man grand jury law'[6] in conformity with which the 'warrant' (34-37) for petitioner's arrest on a criminal charge was issued by a judge of the circuit court for the county of Ingham.

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[4]

The Uniform Criminal Extradition Law as adopted by New Jersey in 1936: N. J. Revised Statutes, 2:185-9 et seq.

[5]

The same Act as adopted by Michigan in 1937: Act No. 144, Pub. Acts 1937 (Mich. Stat. Ann., Cum. Supp. § 28.1285-1 et seq.).—Also certain provisions of the Michigan Code of Criminal Procedure hereinafter scheduled.

[6]

Michigan Code of Criminal Procedure, chap. 7, § § 3-6, incl. (Mich. Comp. Laws 1929, § § 17217-17220 [Mich. Stat. Ann. § 28.943-§ 28.946]).

Appendix 'A', *post*, p. 25, is an explanatory summary Michigan criminal procedure 'in due course' as well under her 'one-man grand jury' system for the in-gation of criminal prosecutions.

Appendix 'B', *post*, p. 37, is a schedule of such Michigan ws.

Appendix 'C', *post*, p. 44, is a summary of the extra-tion papers (16-62) on the basis of which the executive thority of the State of New Jersey honored the requisi-on of the Governor of the State of Michigan for the sur-nder of the petitioner as a fugutive from justice.

In addition to the foregoing, we deem it necessary to set rth the following in correcting inaccuracies and omissions the statement of the other side.[7]

1. On the 2d day of May 1944, having conducted a one-an grand jury inquiry (32) instigated by the attorney eneral of the State (34), pursuant to law (see appendix A'), and having upon consideration of testimony found robable cause to suspect that the petitioner Robichaud nd others were guilty of a criminal offense, a judge of the ircuit court for the county of Ingham issued his 'warrant' (34-37) charging them specifically with having conspired wilfully and corruptly to affect and influence (by means f bribery) the action of the legislature of the State of Michigan'.[8]

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[7]

Supreme Court Rule 27.

[8]

Common-law offenses (here, e.g., conspiracy), for the punishment of which no provision is expressly made by Michigan statute, are defined as a felony under blanket section 505 of her Penal Code (Mich. Stat. Ann. § 28.773).

Thereafter, the petitioner became a fugitive from justice by fleeing to New Jersey;[9] the executive authority of Michigan made requisition (17) upon the Governor of New Jersey for the apprehension and delivery of petitioner to Michigan's authorized agent (16); the chief executive of New Jersey issued his warrant (61) of rendition; and the habeas corpus proceedings under review were instituted.

2. The statements set forth in italics at the bottom of page 6 of the printed petition for certiorari and the brief in support thereof (under the head of 'Facts'), should be qualified:

(a) It is said that four certain documents among a series of papers attached to Michigan's requisition, 'are antedated by the warrant (of May 2, 1944) by various periods' ranging from 29 to 31 days:

(1st) an affidavit (21) of Charles F. Hemans, dated June 1, 1944;

(2nd) a certificate (32) bearing date of June 2, 1944, and signed by the circuit judge who conducted the one-man grand jury inquiry and, as the result thereof, issued the warrant in question;

(3rd) a transcript (47) of testimony taken from the same Charles F. Hemans when examined before the same circuit judge at the preliminary examination conducted by him on the 31st day of May 1944; and

(4th) an affidavit (39) subscribed and sworn to (40) by the prosecuting attorney of Ingham county on June 2, 1944.

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[9] Petitioner raises no question concerning this phase of his extradition from New Jersey to Michigan.

The statement that these documents were executed after the warrant was issued by the one-man grand jury, while true in fact, is of no legal significance, for they were never intended to form the bases of the grand jury warrant, and it is perfectly obvious from their content that they were intended to support the application for extradition, and that they served no other purpose.[10]

For the sake of clarity, it should be said that the warrant issued by the circuit judge after sitting as a one-man grand jury, had as its foundation the testimony of witnesses heard by the judge himself within the confines of the grand jury room.[11]

(b) Nor is there any legal significance (in our opinion, at least) to the further statement that 'at the time of the issuance of the warrant (by the one-man grand jury) there was no affidavit in existence so far as the requisition upon the Governor of New Jersey discloses, upon which the warrant for the apprehension and rendition of the appellant (petitioner) was issued'.

What counsel probably intended to say was that the warrant issued by the circuit judge (after conducting his one-man grand jury inquiry) was not supported by any affidavit.

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[10]

For instance, the affidavit of Hemans (21-29) identifies (28) a photograph of Robichaud attached to the application for extradition; the judge's certificate (32-33) verifies a copy of the warrant issued by him as a one-man grand jury, and states that the certification 'is made for the purpose of aiding and securing the rendition from the State of New Jersey' of petitioner. And the affidavit of the prosecuting attorney (39-40) avers in substance that the offense charged in the warrant is indictable.

[11]

It is quite apparent that Hemans, who signed the affidavit (21-29) in support of extradition, was a grand jury witness (47-55).

This is correct, as a matter of fact, for what supported the warrant was the testimony of witnesses who appeared before the circuit judge during the one-man grand jury inquiry.

IV

Summary of the Argument.

We respectfully submit:

First: There are several grounds on which the Court might doubt its jurisdiction.

1. Each opinion of the courts below interprets and applies provisions of the uniform criminal extradition law of the States of New Jersey[12] and Michigan,[13] holding under such judicial interpretation that the requisition papers (16-60) presented by the executive authority of Michigan to the Governor of New Jersey, complied with the law of New Jersey.

2. Each such opinion interprets pertinent provisions of the code of criminal procedure of the sister State of Michigan, in accordance with the decisions of her highest court, holding that the warrant charging petitioner and others with having committed a criminal offense proscribed by the Michigan penal code, issued by a circuit court judge acting in the capacity of a one-man

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[12] Adopted by New Jersey in 1936 (New Jersey Revised Statutes, 2:185-9 et seq.)

[13] Adopted by Michigan in 1937, Act No. 144 (Mich. Stat. Ann., Cum. Supp. § 28.1285-1 et seq.)

grand jury, constituted an 'indictment' within the meaning of § 3 (3) of the uniform criminal extradition act of the States of New Jersey (R.S. 2:185-11) and Michigan (Stat. Ann., Cum. Supp. § 28.1285-3), and the congressional act of 1793 (18 USCA § 662).

3. Therefore,[14] unless it may be said that the courts' judicial interpretation of the Act of Congress (18 USCA § 662) was so intertwined with their judicial construction of local laws as to render it necessary to decision,[15] the judgment of the court below rests on substantial nonfederal grounds.[16]

Second: If, under the terms of § 237 of the Judicial Code (28 USCA § 344-b), as judicially interpreted (Rule 38), there yet remains a federal question to be resolved by this Court in its discretion, our position is that the extradition papers (16-60) on file in this cause, comply with the provisions of the Act of Congress (18 USCA § 662), as liberally construed by this Court.[17]

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[14]

Since this Court considers itself bound by decisions of the highest court of a State insofar as state law is concerned. Williams v. Kaiser, 323 U.S. 471; Sages Stores Co. v. Kansas, 323 U.S. 32; A.T. & S.F. R'y Co. v. California, 283 U.S. 380.

[15]

State Tax Comm. of Utah v. Van Cott, 306 U.S. 511; though the question is whether the non-federal ground independently supports the judgment. Abie State Bank v. Weaver, 282 U.S. 765.

[16]

See and cf. Geo. A. Richardson Mach. Co. v. Scott, 276 U.S. 128; United States v. Bank of N.Y. & Trust Co., 296 U.S. 463; Williams v. Kaiser, supra; Radio Station WOW v. Johnson, 326 U.S. 120.

[17]

Munson v. Clough, 196 U.S. 364; In re Strauss, 197 U.S. 324, 331; Appleyard v. Massachusetts, 203 U.S. 222; Biddinger v. N.Y. Police Comm., 245 U.S. 128.

1. The warrant (34) issued by a Michigan circuit judge while sitting as a one-man grand jury (32), charges petitioner and others (in specific language) with a felony punishable under the laws of that State (39-40), thereby institutes prosecution by setting in motion prescribed judicial machinery leading to trial, and therefore constitutes an 'indictment' within the meaning of that term as used in 18 USCA § 662, when viewed in the light of the express mandate of the Constitution of the United States (article 4, § 2, sub'n 2).

2. In the alternative, it may be successfully contended that the affidavits on file in the Michigan cause and included in her requisition papers,[18] made before a magistrate of the State,[19] charging the 'person demanded' (petitioner herein) with having committed a felony, comply with the Act of Congress (18 USCA § 662).

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[18]

These include the affidavits of Charles F. Hemans (21-29), a witness who narrates in full detail the circumstances of the crime charged against Robichaud, John Danzo (30-31) and Hubert J. Ellison (42), who corroborate him, Victor C. Anderson (39-40), the prosecuting attorney of Ingham County, who avers in substance that the offense charged against Robichaud is a felony under Michigan law (Penal Code, § 505), and John F. O'Brien (40-41), chief of police in and for the city of Lansing, Michigan, who establishes beyond present controversy the flight of petitioner to New Jersey.

[19]

These affidavits were sworn to before Louis E. Coash, justice of the peace in and for the City of Lansing, County of Ingham, State of Michigan (29, 31, 40, 42), the only acting justice of the peace of that jurisdiction (41-5), and therefore a magistrate authorized to issue warrants (Mich. Code of Criminal Procedure, chapter 4, § 1 [Mich. Comp. Laws 1929, § 17135; Mich. Stat. Ann. § 28.860]).

V

The Argument.[20]

Point One

We suggest several valid reasons why certiorari should be denied in this cause for lack of jurisdiction.

While the granting of a writ of certiorari to review the final judgment of a state court, though controlled by law (28 USCA § 344-b) and circumscribed by rule (Supreme Court Rule 38), is well within judicial discretion, we also note that the Court never interferes with the criminal procedure ordained by a State unless there is a manifest infringement of some right defined by the Federal Constitution or a violation of some fundamental privilege which, because 'implicit in the concept of ordered liberty',[21] is guaranteed by the Fourteenth Amendment.

No such privilege or right, we respectfully submit, has been invaded or restricted in this cause by Michigan or New

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[20]

The argument in this brief (in compliance with Rule 27) is made as summary and concise as possible, all matters of detail relative to the laws of New Jersey and Michigan being left to the appendixes.

[21]

Palko v. Connecticut, 302 U.S. 319, 325. This Court has recently reaffirmed the established doctrine that a State may control her criminal procedure 'in accordance with its own ideas of the most efficient administration of criminal justice' Adamson v. California, No. 102 October Term 1946, slip opinion, p. 10.

Jersey, and only a 'technical rule of law' is drawn in question.[22]

1. The opinion of the Supreme Court of New Jersey, 134 N.J.L. 532, 49 A 2d 287, adopted by the court below,[23] holds *(1st)* that the warrant (34) issued by the Michigan trial court (32) 'charges a crime against the petitioner and others in the manner provided by the laws of the demanding State'; *(2nd)* that the charge is made 'by a duly constituted grand jury under the statute law of Michigan'; and *(3rd)* that 'such warrant as is now before the court is a sufficient instrument on which the petitioner could be apprehended and held for trial in the demanding State'.

The reasoning of the New Jersey Supreme Court proceeds along the following line: that the single question for decision is whether Michigan's procedure is adequate, under the law, to require and warrant the Governor of New Jersey to turn the petitioner over to the demanding State;[24] that the Governor of Michigan made due authen-

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[22]

The effort at bar seems to split hairs over the term 'indictment', although the warrant issued by the Michigan one-man grand jury informs the accused in the clearest possible language, of the nature of the offense charged against them, accords them the right to a preliminary examination and a full pre-trial hearing (unless waived by flight from the state), whereas those indicted by the traditional 16-member grand jury must stand trial without such benefits.

[23]

Each opinion follows the line of reasoning of the court of original jurisdiction (140).

[24]

The court notes that petitioner argues that the procedure in the instant case does not comply with the requirements of the extradition statutes of either the Federal Government or the State of New Jersey, and it cites and quotes from each. But, it should be noted, the Supreme Court of New Jersey does not construe the language of the Congressional Act of 1793 (18 USC § 662), nor does decision turn thereon.

tication that the warrant issued was in accordance with the laws of that State and charged the accused with a crime under such laws; that one of the judges of the Ingham circuit court inquired into the complaint and issued a warrant which sets forth at length and clearly alleges the charges; that it states that the inquiry was in accordance with the statutes cited (the Michigan 'one-man grand jury law'); and that, under decisions of the Supreme Court of Michigan,[25] the grand jury warrant 'took the place of an indictment, which under the Code of Criminal Procedure, 3 Comp. Laws 1929, 17118, Stat. Ann. 28.843, includes the words information, presentment, complaint, warrant and any other written accusation'.

Having expressed this opinion, and having agreed with the conclusions of the trial judge, the New Jersey court said:

> "The warrant is, in effect, an indictment within the meaning of the extradition statute, is in compliance therewith and alleges an offense against the laws of the State of Michigan. The authorities of this State will not pass upon the validity of a complaint filed in another jurisdiction".[26]

2. The New Jersey courts, while considering the Federal law (18 USC § 662), interpreted and applied the provi-

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[25]

People v. Kert, 304 Mich. 148; People v. Ewald, 302 Mich. 31; In re Watson, 293 Mich. 263; People v. St. John, 284 Mich. 24; In re Investigation of Recount, etc., 270 Mich. 328. And see authorities cited in Appendix A.

[26]

In the courts below, petitioner's counsel contended, inter alia, that the warrant failed to charge an offense known to the law of Michigan, but that question is not pressed here.

sions of the uniform criminal extradition law, as adopted by that State, and this Court would ordinarily consider itself bound thereby,[27] unless two grounds, state and federal, are inextricably interwoven.[28] Here, however, we respectfully suggest, the state ground is sufficient to sustain the judgment, and hence this Court should hesitate to review it. There are decisions to the effect that a writ of certiorari must be dismissed where the state court's decision rested on nonfederal grounds, notwithstanding an unnecessary discussion of a federal constitutional question;[29] that the Court will not review a state court decision resting on an adequate and independent nonfederal ground, although the decision also rests upon an erroneous view of federal law;[30] and that in such circumstances it is for the Court to determine whether a nonfederal ground independently supports the state judgment.[31]

Or, putting it another way, the Court has held[32] it has no jurisdiction to review a state court decision unless it appears affirmatively from the record not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision of a

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[27]

A. T. & S. F. Railway Co. v. California, 283 U.S. 380; Sages Stores Co. v Kansas, ex. rel. Mitchell, 323 U.S. 32; Williams v. Kaiser, 323 U.S. 471.

[28]

State Tax Commission of Utah v. Van Cott, 306 U.S. 511.

[29]

George O. Richardson Machine C. v. Scott, 276 U.S. 128.

[30]

Williams v. Kaiser, supra; Radio Station WOW v. Johnson, 326 U. S. 120.

[31]

Able State Bank v. Weaver, 282 U.S. 765.

[32]

Southwestern Bell Tel. Co. v. Oklahoma, 303 U.S. 206.

federal question was necessary to determination of the cause, that the federal question was actually decided, or that the judgment as rendered could not have been decided without deciding it.[33]

The opinions expressed by the courts below and the judgment rendered are supported, we respectfully submit, by a substantial, independent nonfederal ground. That independent ground, we think, is that the warrant issued by the Michigan one-man grand jury constituted an indictment within the meaning of the New Jersey extradition law (R.S. N.J., 2:185-11). Under the Federal Constitution (article 4, § 2), and the Act of Congress (18 USC § 662), as we personally view them, certain rights (with respect to extradition) were reserved to the States as sovereign powers, and there was no intent to limit their exercise. As we shall presently note, the express language of § 662 of the Code imposes upon the Governor of the asylum State an affirmative duty, under the conditions prescribed, to cause a fugitive from the justice of the demanding State 'to be arrested and secured . . . and to cause the fugitive to be delivered' to the agent or representative of the demanding State.[34] The matter of detail, of procedure, and of in-

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[33]

See also State of Indiana ex rel. Anderson v. Brand, 303 U.S. 95; rehearing denied, 303 U.S. 667; and, for converse, cf. Commonwealth of Virginia v. Imperial Coal Sales Co., inc., 293 U.S. 15 with Honeyman v. Hanan, 300 U.S. 14.

[34]

As the judge of the trial court said (152-153) so well: 'The constitutional provision was designed to aid the respective states in bringing to justice persons charged with crime who had fled the jurisdiction in order to escape prosecution and punishment, and not to hamper them. It was designed for the benefit of the states, not for individuals. It was not intended that its operation should confer asylum upon an alleged malefactor because of technical consideration—exactly the opposite result was intended—to prevent a person charged with crime from finding asylum within the borders of another state'.

dividual rights, was left to the States, and each of the States involved in this controversy has enacted a law defining such procedure and rights (they are, we think, more restrictive than the Act of Congress).

It follows, we respectfully suggest, that the judgment of the courts below is not reviewable by this Court.

Point Two

If a federal question remains, then we contend that the extradition papers (16-60) submitted by Michigan, comply with the provisions of the Act of Congress, supra.

Article IV of the Constitution of the United States, with one possible exception,[35] reserves to the states certain sovereign rights, defines certain duties which each owe to the other, limits the admission of new States to the Union, grants to the Congress certain defined powers, and guarantees to every State a republican form of government. It is not a bill of rights; if defines no individual privileges; and it was not designed to protect the individual citizen (with the one exception pointed out in footnote 35). Subdivision 2 of section 2 of this article reads:

> "A person *charged* in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime".

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[35] Section 2, clause 1, of the article guarantees to the citizens of each State 'all privileges and immunities of citizens in the several States'.

The Congress implemented this clause of section 2 when it enacted the extradition law of 1793 (18 USC § 662), but we suggest it may be said that the provisions of that Act could not, if properly construed, restrict or limit the right or power reserved to each State in the Federal Constitution.

That Act provides:

> "§ 662. Fugitives from State or Territory. Whenever the executive authority of any State . . . demands any person as a fugitive from justice, of the executive authority of any State . . . to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State . . . , *charging the person demanded* with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State . . . from whence the person so charged has fled, it shall be the duty of the executive authority of the State . . . to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given . . . (etc., etc., in language not pertinent here)".

The foregoing language of the Constitution and Federal Law has always received a liberal construction.

> "Constitutional and statutory provisions relating to interstate extradition should be liberally construed to effectuate their purposes . . . The Federal Constitution guarantees no right of asylum to a person who has committed a crime in one state and fled to another".

35 C.J., Sec. 320, and cases cited.

As this Court has said:[36]

> "Under the Constitution each State was left with full control over its criminal procedure. None could have anticipated what change any state might make therein, and doubtless the word 'charged' was used in its broad signification to cover any proceeding which a state might see fit to adopt by which a formal accusation was made against an alleged criminal. In the strictest sense of the term a party is charged with crime when an affidavit is filed alleging the commission of an offense and a warrant is issued for his arrest, and this in true whether a final trial may or may not be had upon such charge. It may be, and is true, that in many of the States some further proceeding is, in the higher grade of offenses at least, necessary before the party can be put upon trial, and that the proceedings before the examining magistrate are preliminary, and only with a view to the arrest of the alleged criminal; but extradition is a mere proceeding in securing arrest and detention. An extradited defendant is not put on trial upon any writ which is issued for the purposes of extradition, any more than he is upon the warrant which is issued by the justice of the peace directing his arrest".

And, the Court inquires: 'Why should the state be put to the expense of a grand jury and an indictment before securing possession of the party to be tried?', concluding this phase of the opinion in the following words:

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[36]

In re Strauss, 197 U.S. 324, overruling the contention that since the petitioner, who was charged with a felony by affidavit before a justice of the peace could not be tried before such justice for such felony, he was not charged with a crime within the intendment of the Constitution, and that there had to be an indictment found against him.

"While courts will always endeavor to see that no such attempted wrong (wanton misuse of the extradition process) is successful, on the other hand *care must be taken that the process of extradition be not so burdened as to make it practically valueless.* [Emphasis supplied]. It is but one step in securing the presence of the defendant in the court in which he may be tried, and in no manner determines the question of guilt".

The same thought was again expressed by the Court in

Appleyard v. Massachusetts, 203 U.S. 222, 228,

where it is said:

" . . . And while a state should take care within the limits of the law, that the rights of its people are protected against illegal action, the judicial authorities of the Union should equally take care that the provisions of the Constitution be not so narrowly interpreted as to enable offenders against the laws of a state to find a permanent asylum in the territory of another state".

Other decisions of the Court, the majority of which are treated by the trial judge in a scholarly manner (140-162), sustain such a liberal interpretation.[37]

"Such being the origin and purpose of these provisions of the Constitution and statutes, they have not been construed narrowly and technically by the courts as if they were penal laws, but liberally to effect their important purpose. . ."

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[37] See, among others, Pierce v. Creecy, 210 U.S. 387; Compton v. Alabama, 214 U.S. 1; Strassheim v. Daly, 221 U.S. 280; and Biddinger v. N.Y. Police Commissioner, 245 U.S. 128.

Biddinger v. N.Y. City Police Comm'r, 245 U.S. 128, 133.

These principles may be applied to the present case in short order:

1. The warrant was issued by a judicial officer (the judge of a trial court vested with the highest authority) who, at the request of Michigan's attorney general, had lawfully constituted himself a one-man grand jury, had conducted an investigation 'concerning certain criminal offenses' (34), had examined witnesses and heard their testimony,[38] and, based thereon, had found probable cause to suspect that the petitioner and others had committed a crime punishable as a felony under the laws of the State of Michigan. He did not rely on mere affidavits, nor did he listen to the complaint of an injured party who charged a specific criminal offense of which he was the victim. The crime charged in the warrant (conspiracy to corrupt the legislature of the State) was against the commonwealth itself; and the story came, as it had before in Michigan's recent history,[39] out of the mouths of witnesses who incriminated themselves.[40]

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[38]
The investigation had a wide range that covered the alleged misconduct of members of the legislature and their co-conspirators.

[39]
In re Slattery, 310 Mich. 458; certiorari denied, 325 U.S. 876; In re Watson, 293 Mich. 263; In re Wilkowski, 270 Mich. 787. See also, In re Ward, 295 Mich. 742; In re Cohen, 295 Mich. 748. These cases indicate that in the majority of instances, such witnesses are reluctantly compelled to tell the truth.

[40]
See affidavit (21) and examination (47) of Charles F. Hemans, who incriminated himself and others. This method of compulsion of the truth is one of the advantages of Michigan's grand jury system. Cf. recent case of Adamson v. California.

The warrant thus issued was not the ordinary process to authorize arrest; it 'charged' the commission of a crime in explicit terms and in plain understandable language; it 'indicted' the petitioner, informed him of the nature of the offense, and it furnished him the details. The entire proceedings from start to finish were ordained by the law of the State and, under decisions of her highest court, the 'warrant' stood in the place of an indictment, the only distinction between the 'one-man grand jury' procedure and that of the traditional grand jury being that in petitioner's case the accused were afforded the additional safeguard of a preliminary examination.

We, therefore, respectfully submit that the Michigan warrant of arrest, charging petitioner with a felony, constitutes an indictment (a formal charge of crime) within the meaning of the Constitution and the Act of Congress.

2. Moreover, the Act of Congress (18USC § 662) requires a fugitive to be surrendered when the executive authority of the demanding State 'produces an affidavit made before a magistrate, . . . charging the person demanded with having committed . . . felony'. It says nothing about a warrant, nor does it require that the affidavit shall precede the warrant in course of time.

In the case at bar, the State produced several affidavits (21-31, 39-40, 42, 43) charging the person demanded with having committed a felony. These affidavits were 'made before a magistrate', a justice of the peace of the city of Lansing having jurisdiction in the premises. They relate in full the details of the crime, and they justified issuance of the governors' warrants of requisition and rendition. Then, to make doubly certain, the Michigan authorities, out of an abundance of precaution, attached to these extradition papers a transcript of the examination (47-55) of the

witness Major Charles F. Hemans, who testified under oath during the preliminary examination in this cause.

We, therefore, respectfully submit there is no substance in petitioner's complaint that he has been denied due process of law.

VI

Conclusion.

For the reasons set forth in this brief (esp., in the summary of argument), we respectfully submit the writ of certiorari should be denied the petitioner.

Respectfully Submitted,

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Counsel for Respondents

APPENDIX 'A'

Summary of Michigan's criminal procedure 'in due course' and under her 'one-man grand jury' system.[1]

For a clear understanding of the true function of Michigan's 'one-man grand jury' it is essential to consider *(1st)* her early relinquishment (1850) of a constitutional guarantee (1835) that 'no person shall be held to answer for a criminal offense, unless on the presentment or indictment of a grand jury';[2] *(2nd)* her procedure 'in due course' for magisterial investigation of complaints charging criminal offenses not cognizable by a justice of the peace, for the arrest of offenders, for the conduct of a preliminary examination,[3] and for filing an information by the prosecuting attorney;[4] *(3rd)* the special proceedings drawn in controversy here, authorized by her law for extraordinary occasions, in which a justice of the peace or a judge of a court of record constitutes himself a 'one-man grand jury' to investigate suspected criminal offenses by examining

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[1]

Michigan has two separate codes governing criminal cases: first, her 'Penal Code', defining criminal offenses and providing grades of punishment therefor (Act No. 328, Pub. Acts 1931 [Mich. Stat. Ann. § 28.191 et seq.]) and, second, her 'Code of Criminal Procedure' (Act No. 175 Pub. Acts 1927 [Mich. Comp. Laws 1929, § 17116 et seq.; Mich. Stat. Ann. § 28.841 et seq.]).

[2]

Cf. State Const. 1835, art. 1, § 11; State Const. 1850, art. 6, § 28; State Const. 1908, art. 2, § 19.

[3]

Mich. Code of Criminal Procedure, chap. 6 (Mich. Comp. Laws 1929, § 17193 et seq. [Mich. Stat. Ann. § § 28.919 et seq.]).

[4]

Michigan Code of Criminal Procedure, chap. 7 § 40 (Mich. Comp. Laws 1929, § 17254 [Mich. Stat. Ann. § 28.980]).

material witnesses;[5] and *(4th)* the purposes for which Michigan's one-man grand jury law has been invoked.

1

Abolishment of traditional grand jury.

Article 1, § 11, of Michigan's first constitution (1835), following somewhat the pattern of the 5th Amendment to the Federal Constitution, guaranteed that no person should be held for a criminal offense 'unless on the presentment or indictment of a grand jury', except in specified instances; but the Constitution of 1850, article 6, § 28, and Michigan's present Constitution (1908), article 2, § 19, omitted that requirement, and substituted therefor the 'right to be informed of the nature of the accusation'.[6]

> "In 1859 the regular calling of grand juries was dispensed with and provisions were made for prosecuting offenders by means of informations filed by the prosecuting attorney, although the grand jury was preserved as an institution of the court, to be invoked by the cir-

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[5]

Idem., chap. 7, § § 3, 4, 5, and 6 (Mich. Comp. Laws 1929, § § 17217-17220, incl. [Mich. Stat. Ann. § § 28.943-28.946, incl.]).

[6]

This section of Michigan's bill of rights also guarantees inter alia 'a speedy and public trial', the right 'to be confronted by the witnesses', 'to have compulsory process', and to 'have the assistance of counsel'.

cuit judge if conditions should warrant''.[7]

Gillespie's Criminal Law and Procedure, Vol. 1, § 99, pp. 101-102.

The present law of Michigan[8] prohibits the drawing of grand juries unless the judge shall so direct.[9]

2

Procedure in due course.

The Michigan statute charts a course for magistrates when called upon to consider specific complaints charging criminal offenses not cognizable by a justice of the peace, to issue warrants thereon, to conduct preliminary examinations, and when probable cause is satisfactorily shown, to

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[7]

The author of this statement observes by way of foot note that the Michigan legislature in 1931 (Act No. 284) provided for a permanent grand jury in every county of 70,000 population and upward, to meet twice in each year; and that in a little over one year, it appeared that the plan was not a success, and the statute was repealed (Act No. 31, Pub. Acts Mich. 1933).

[8]

Section 7 of chapter 7 of the Michigan Code of Criminal Procedure provides that 'grand juries shall not hereafter be drawn, summoned to attend at the sittings of any court within this state, . . . unless the judge thereof shall so direct by writing under his hand, and filed with the clerk of said court' (Mich. Comp. Laws 1929, § 17221 [Mich. Stat. Ann. § 28.947]).

[9]

This discretion is seldom exercised, for in Michigan the 'one-man grand jury' has in recent years taken the place once occupied by the traditional 16-member grand jury. People v. McCrea, 303 Mich. 213 (cert. denied, 318 US. 783); People v. Roxborough, 307 Mich. 575 (cert. denied, 323 U.S. 749); and In re Slattery, 310 Mich. 458 (cert. denied, 325 U.S. 876).

hold the accused for trial in a court of competent jurisdiction.[10]

Chapter 6 of the code (cited in footnote 10) provides in substance that whenever any complaint shall be made to any magistrate,[11] that such an offense has been committed, he shall examine on oath the complainant and any witnesses who may be produced by him (§ 2; Comp. Laws § 17194; Stat. Ann. § 28.920).

Upon sufficient showing of the commission of such a crime,[12] the magistrate is authorized to issue his warrant to bring the accused before him 'to be dealt with according to law' (§ 3, Comp. Laws § 17195; Stat. Ann. § 28.921), and, when the accused person appears, the magistrate is required to set a date for a preliminary examination to be conducted by him (§ 4; Comp. Laws § 17196; Stat. Ann. § 28.922).

Should it appear from the testimony taken at the examination, that the offense charged in the warrant has been committed and that 'there is probable cause to believe the prisoner guilty thereof' (§ 5; Comp. Laws 1929, § 17197; Stat. Ann. § 28.923), the matter of bail shall be considered

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[10]

Mich. Code of Cr. Pro., chap. 6 (Mich. Comp. Laws 1929, § 17193 et seq. [Mich. Stat. Ann. § 28.919 et seq.]).

[11]

Such magistrates include the justices of the supreme court, the several circuit judges, courts of record having jurisdiction of criminal causes and all justices of the peace, and other officers named in chapter 4, § 1, of the code (Mich. Comp. Laws 1929, § 17135; Stat. Ann. § 28.860).

[12]

Under a proviso of the foregoing section, however, such warrants are generally issued upon written order of the prosecuting attorney, unless security for costs shall have been filed.

and appropriate action taken, and 'said magistrate shall forthwith bind such defendant to appear before the circuit court of such county or any court having jurisdiction of said cause, for trial (§ 13; Comp. Laws 1929, § 17205; Stat. Ann. § 28,931), and he is required to make a prompt return of his findings to the trial court (§ 15; Comp. Laws 1929, § 17207; Stat. Ann. § 28,933), accompanied by a transcript of the testimony taken at the preliminary examination as required by law (§ 11; Comp. Laws 1929, § 17203; Stat. Ann. § 28,929).

Thereafter, it becomes the duty of the prosecuting attorney of the county to file an information, subscribe his name thereto, and indorse thereon the names of the witnesses known to him at the time.[13]

3

The Michigan 'One-man Grand Jury'.

Chapter 7 of the Code of Criminal Procedure (containing 83 sections), as its caption indicates, regulates all matters pertaining to 'grand juries, indictments, informations and proceedings before trial'. Many of its provisions reenact old statutes (some going back as far as 1846) which in their time governed the traditional grand jury of 16 members,[14]

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[13]

Mich. Code of Cr. Pro., chap. 7, § 40 (Mich. Comp Laws 1929, § 17254 [Mich. Stat. Ann. § 28.980]).

[14]

E.g., § 8 provides grounds for discharging a grand juror (Comp. Laws 1929, § 17222; Stat. Ann. § 28.948); § 9 provides for the preparation of grand juror lists, and for the form of oath to be administered to them (Comp. Laws 1929, § 17223; Stat. Ann. § 28.949); § 11 provides there shall not be less than 16 persons sworn on any grand jury, and for the appointment by the court of one of their number to be foreman (Comp. Laws 1929, § 17225; Stat. Ann. § 28.951), etc., etc.

as well as indictments returned by it.[15]

Since many of the terms used in this chapter are undoubtedly interchangable, it may be helpful by way of introduction to note certain statutory definitions relating thereto:

Section 1 of chapter 1 of the code (Comp. Laws 1929, § 17118; Stat. Ann. § 28.843) provides, among other things, that in the act 'the word "indictment" includes information, presentment, warrant and any other formal written accusation'.

The first section of the chapter in question (VII) provides in substance that courts having jurisdiction of criminal causes 'shall possess and may exercise the same power and jurisdiction to hear, try and determine prosecutions upon *informations* for crimes, misdemeanors and offenses, to issue writs and process . . . therein as they possess and may exercise in cases of like prosecutions upon *indictments*'

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[15]

E.g., § 24 provides a time limitation on the finding of indictments for specified crimes (Comp. Laws 1929, § 17238; Stat. Ann. § 28.964); § 25 provides the manner in which grand jury indictments shall be presented by their foreman to the court (Comp. Laws 1929, § 17239; Stat. Ann. § 28.965); § 30 provides a warrant for the arrest of any person indicted (Comp. Laws 1929, § 17244; Stat. Ann. § 28.970); § 37 provides procedure on arraignment to an indictment (Comp. Laws 1929, § 17251; Stat. Ann. § 28.977); § 43 provides the general form of an indictment (Comp. Laws 1929, § 17257; Stat. Ann. § 28.983), while § 44 provides short forms therefor Comp. Laws 1929, § 17258; Stat. Ann. § 28.984); § 45 provides what an indictment or information shall contain (Comp. Laws 1929, § 17259; Stat. Ann. § 28.985); § 46 provides for amending an indictment (Comp. Laws 1929, § 17260; Stat. Ann. § 28.986); and § 47 provides that 'no indictment is invalid by reason of any repugnant allegations contained therein, provided that an offense is charged (Comp. Laws 1929, § 17261; Stat. Ann. § 28.987).

(Comp. Laws 1929, § 17215; Stat. Ann. § 28.941). [Emphasis ours].

And the second section thereof applies the law of indictments to 'informations and all prosecutions and proceedings thereon' (Comp Laws 1929, § 17216; Stat. Ann. § 28.942).

The four sections that follow immediately in chapter 7 of the code of criminal procedure,[16] confer upon 'any justice of the peace, police judge or judge of a court of record' the power and duty to conduct what in Michigan law, as interpreted by the State's highest court,[17] is known as a 'one-man grand jury' investigation.[18]

The key that opens the door to exertion of such power is supplied by section 3 of the chapter (Comp. Laws 1929, § 17217; Stat. Ann. § 28.943) and provides:

> "**Sec. 3.** Whenever by reason of the filing of any complaint, which may be upon information and belief, any justice of the peace, police judge or judge of a court of record shall have probable cause to suspect that any crime, offense, misdemeanor or violation of

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[16]

Mich. Code of Criminal Procedure, chap. 7, § § 3-6, incl. (Mich. Comp. Laws 1929, § § 17217-17220 [Mich. Stat. Ann. § § 28.943-28.946]).

[17]

Oakman v. Recorder of Detroit, 207 Mich. 15; People v. Butler, 221 Mich. 626; In re Petition for Investigation of Recount, 270 Mich. 328; People v. O'Hara, 278 Mich. 281; In re Hickerson, 301 Mich. 278; People v. Wilcox, 303 Mich. 287; and In re Slattery, 310 Mich. 458 (cert. denied, 325 U.S. 876).

[18]

Sections 3 to 6, incl., of chapter 7 of the code, reënacted a statute, Act No. 196, Pub. Acts Mich. 1917, as amended, which enlarged the powers of magistrates to investigate complaints and issue warrants.

> any city ordinance shall have been committed within his jurisdiction, and that any person may be able to give any material evidence respecting such offense, such justice or judge in his discretion may, and upon application of the prosecuting attorney, or city attorney . . . . , shall require such person to attend before him as a witness and answer such questions as such justice or judge may require concerning any violation of law about which he may be questioned; and the proceedings to summon such witnesses and to compel him to testify shall, as far as possible, be the same as proceedings to summon witnesses and compel their attendance and testimony, and such witnesses shall be entitled to the same compensation as in other criminal proceedings''.

If upon such inquiry the justice or judge shall be satisfied that any offense has been committed and that there is probable cause to suspect any person or persons to be guilty thereof, 'he may cause the apprehension of such person or persons by proper process and, upon the return of such process served or executed, the justice or judge shall proceed with the case, matter or proceeding in like manner as upon formal complaint'.[19]

So far as secrecy is concerned, those participating in the inquiry 'shall be governed by the provisions of law rel-

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[19]

Also, if so satisfied, the justice or judge shall report the matter to the proper officials to the end that any public officer so accused may be removed from office. These are all considered to be 'judicial acts'. In re Slattery, 310 Mich. 458; cert. denied, 325 U.S. 876.

ative to grand juries' (id., § 4 [Comp. Laws 1929, § 17218; Stat. Ann. § 28.944]).[20]

Witnesses who neglect or refuse to appear upon summons of the one-man grand jury 'or to answer questions . . . . material to such inquiry' may be punished for contempt,[21] though the sentence imposed may in judicial discretion be commuted or suspended if the witness appears and answers such questions *(id.,* § 5 [Comp. Laws 1929, § 17219; Stat. Ann. § 28.945]).

And under the provisions of § 6 of chapter 7 of the code (Comp. Laws 1929, § 17220 [Stat. Ann. § 28.946]), a witness who answers questions which might tend to incriminate him, is granted full immunity from prosecution for any offense concerning which he testifies.[22]

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[20]

Hence, it has been held, In re Slattery, supra, that because of the secrecy of one-man grand jury proceedings, as provided in § 4, chap. 7, a transcript of such proceedings is not included in its entirety in the return to writs of habeas corpus and certiorari issued on petition by a witness who has been jailed for contempt in failing to give proper answers to questions put to him in one-man grand jury proceedings.

[21]

Such a proceeding in contempt is deemed criminal in nature. In re Wilkowski, 270 Mich. 787. See: In re Ward, 295 Mich. 742; In re Cohen, 295 Mich. 748; and In re Slattery, supra.

[22]

This section of the code is in recognition of the state constitutional mandate that 'no person shall be compelled in any criminal case to be a witness against himself' (Mich. Const. 1908, article 2, § 16). It, of course, does no violence to the 5th or 14th Amendments to the Federal Constitution. Adamson v. California, Oct. Term 1946, No. 102, June 23, 1947. Cf. In re Watson, 293 Mich. 263. And see: In re Schnitzer, 295 Mich. 736; People ex rel. Roach v. Carter, 297 Mich. 577; People v. Reading, 307 Mich. 616; People v. Woodson, 309 Mich. 391; People v. Norwood, 312 Mich. 266, in which the court repeatedly refers to such proceedings as those of a 'one-man grand jury'.

4

Purposes for which Michigan one-man grand jury is employed.

It is at least worthy of note that the one-man grand jury law has been called into play in Michigan only when considered necessary to the public interest, or where it was deemed important to investigate wide-spread corruption in high places.[23] A few examples will suffice:

Thus, in a comparatively early case, a one-man grand jury investigated a rather vicious combination in restraint of trade intrastate,

People v. Butler, 221 Mich. 626.[24]

The law in question was later used to investigate, charge,

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[23]

In the case at bar, members of the legislature and others, including petitioner, were charged by the one-man grand jury with having conspired to corrupt the legislature of the State of Michigan by means of bribery.

[24]

The court held that under the provisions of § 4, chap. 7, of the code, supra, the stenographer who took the testimony before the grand jury held by a justice of the peace was properly allowed to testify as a witness for the people to the testimony given by some of the defendants before such jury.

and convict[25] a former mayor of the city of Hamtramck, high-ranking police officers of that municipality, and the proprietors of houses of prostitution, of a common-law conspirary[26] to obstruct justice by wilfully and corruptly permitting and allowing them to operate,

People v. Tenerowicz, 266 Mich. 276.

It was employed to investigate, charge, and convict the members of a legislative committee and others who attempted to conduct a recount of votes cast for candidates for state office, of a common-law conspiracy to violate provisions of the State's general election law,

In re Investigation of Recount, 270 Mich. 328;

People v. O'Hara, 278 Mich. 281.

Such a one-man grand jury investigated corrupt practices in Wayne county and charged the prosecuting attorney and his chief investigator, the sheriff and his deputy, together with the operators of houses of ill fame and other illegal enterprises, with a common-law conspiracy to ob-

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[25]

To say that this state law is used to 'convict', simply means that testimony of witnesses who appeared before the one-man grand jury, and, under compulsion of the fear of punishment for contempt, admitted their own guilt and implicated others, is offered in evidence at the trial. The law is thus made an effective instrument for evoking truth. For, by way of analogy, 'a state may control such a situation in accordance with its own ideas of the most efficient administration of criminal justice. The purpose of due process is not to protect an accused against a proper conviction'. Adamson v. California, supra, slip opinion, p. 10.

[26]

Common-law conspiracies are punishable under § 505 of the Michigan Penal Code (Stat. Ann. § 28.773) which makes it a felony to commit any indictable offense at the common law, 'for the punishment of which no provision is expressly made by any statute' of the State.

struct justice by engaging in a 'protection money' scheme, and the defendants were later convicted,

People v. McCrea, 303 Mich. 213; cert. denied (October Term 1942, No. 651), 318 U.S. 783;

People v. Wilcox, 303 Mich. 287; and cases in sequence.

The same basic conspiracy was involved in a later group of cases where a one-man grand jury indicted and the State prosecuted and convicted the proprietors of gambling enterprises (numbers and mutuel), a former mayor of the city of Detroit and other law-enforcing agents, of a common-law conspiracy to obstruct justice by means of systematic bribery,

People v. Roxborough, 307 Mich. 575; cert. denied, 323 U.S. 749; and see cases in sequence, including

People v. Ryan, 307 Mich. 610, and *People v. Reading*, 307 Mich. 616.

And, finally, the same one-man grand jury, investigating corruption in the county of Wayne, charged, and the people convicted police officers of the city of Detroit, the secretary of the mayor of that municipality (People v. Reading, *supra*, and the proprietors of 'hand books', of a common-law conspiracy to obstruct justice by means of 'protection money' or bribery,[27]

People v. Heidt, 312 Mich. 629;

People v. Bartlett, Reading et al., 312 Mich. 648, and cases following in sequence.

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[27]

We trust it is permissible to say, in the light of the conspiracy cases cited in this appendix, that were it not for Michigan's one-man grand jury system (however it may be criticized by its opponents), conviction of public officials who have been derelict in their trust, would have been impossible.

APPENDIX 'B'

Schedule of pertinent provisions of Michigan Code of Criminal Procedure relating especially to one-man grand jury investigations.

1

Criminal procedure in due course.[28]

Chapter I[29]

"**(Section 1).** In this act: . . The word 'indictment' includes information, presentment, complaint, warrant and any other formal written accusation" (Mich. Comp. Laws 1929, § 17118 [Mich. Stat. Ann. § 28.843]).

Chapter VI[30]

"**Section 1.** The state and accused shall be entitled to a prompt examination and determination by the examining magistrate in all criminal causes and it is hereby made the duty of all courts and public officers having duties to perform in connection with such examination, to bring them to a final determination without delay except as it may be necessary to secure to the accused a

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[28]

Michigan Code of Criminal Procedure (Act No. 175, Pub. Acts 1927), chap. 1, § 1; and chap. 6, § § 1-5, incl., 12, 13, 14 and 15 (Mich. Comp. Laws 1929, § § 17118, 17193-17197, incl., 17204-17207, incl., [Mich. Stat. Ann. § § 28.843, 28.919-28.923, incl., and 28.930-28.933, incl.]).

[29]

Chapter I is entitled 'Definitions'.

[30]

Chapter VI is entitled 'Examination of Offenders'.

fair and impartial examination" (Mich. Comp. Laws 1929, § 17193 [Mich. Stat. Ann. § 28.919]).

"**Sec. 2.** Whenever complaint shall be made to any magistrate named in section one [1], chapter four [4], of this act,[31] that a criminal offense not cognizable by a justice of the peace has been committed, he shall examine on oath the complainant and any witnesses who may be produced by him" (Mich. Comp. Laws 1929, § 17194 [Mich. Stat. Ann. § 28.920]).

"**Sec. 3.** If it shall appear from such examination that any criminal offense not cognizable by a justice of the peace has been committed, the magistrate shall issue a warrant directed to the sheriff, . . reciting the substance of the accusation and commanding him forthwith to take the person accused of having committed such offense and to bring him before such magistrate to be dealt with according to law, and in the same warrant may require such officer to summon such witnesses as shall be named therein" (Mich. Comp. Laws 1929, § 17195 [Mich. Stat. Ann. § 28.921]).

"**Sec. 4.** The magistrate before whom any person is brought on a charge of having committed an offense not cognizable by a justice of the peace, shall set a day for examination not exceeding ten [10] days thereafter, at which time he shall examine the complainant and the witnesses in support of the prosecution, on oath in the presence of the prisoner, in regard to the offense charged and in regard to any other matters

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[31]

Such magistrates include justices of the peace, the justices of the supreme court, the several circuit judges, courts of record having jurisdiction of criminal causes, and other officers of lower grade (Mich. Comp. Laws 1929, § 17135 [Mich. Stat. Ann. § 28.860]).

connected with such charge which such magistrate may deem pertinent" (Mich. Comp. Laws 1929, § 17196 [Mich. Stat. Ann. § 28.922]).

"**Sec. 5.** If it shall appear that an offense not cognizable by a justice of the peace has been committed, and that there is probable cause to believe the prisoner guilty thereof, and if the offense be bailable by the magistrate, and the prisoner offer sufficient bail, it shall be taken and the prisoner discharged; but if no sufficient bail be offered, or the offense be not bailable by the magistrate, the prisoner shall be committeed to jail for trial" (Mich. Comp. Laws 1929, § 17197 [Mich. Stat. Ann. § 28.923]).[32]

"**Sec. 12.** After the testimony in support of the prosecution has been given, the witnesses for the prisoner, if he have any, shall be sworn, examined and cross-examined, and he may be assisted by counsel in such examination and in the cross-examination of the witnesses in support of the prosecution" (Mich. Comp. Laws 1929, § 17204 [Mich. Stat. Ann. § 28.930]).

"**Sec. 13.** If it shall appear to the magistrate upon the examination of the whole matter, either that no offense has been committed or that there is not probable cause for charging the defendant therewith, he shall discharge such defendant. If it shall appear to the magistrate upon the examination of the whole matter, that an offense not cognizable by a justice of the peace has been committed and there is probable cause for charging the defendant therewith, said magistrate shall forthwith bind such defendant to appear before the

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[32]

Sections 6-11 of this chapter, omitted from the text of this appendix, deal with the conduct of such examinations.

circuit court of such county or any court having jurisdiction of said cause, for trial" (Mich. Comp. Laws 1929, § 17205 [Mich. Stat. Ann. § 28.931]).

"**Sec. 14.** If, upon the examination of a person charged with a felony or an offense not cognizable by a justice of the peace, it shall appear that the offense charged is not a felony or is an offense cognizable by a justice of the peace, the accused shall not be dismissed but the magistrate shall proceed, as soon as possible, to the trial of said accused in the same manner as if he had been charged with the misdemeanor or offense cognizable by a justice of the peace" (Mich. Comp. Laws 1929, § 17206 [Mich. Stat. Ann. § 28.932]).

"**Sec. 15.** All examinations and recognizances taken by any magistrate pursuant to any of the provisions of this chapter, shall be forthwith certified and returned by him to the clerk of the court before whom the party charged is bound to appear, and if such magistrate shall refuse or neglect to return the same, he may be compelled forthwith by rule of the court . . . . " (Mich. Comp. Laws 1929, § 17207 [Mich. Stat. Ann § 28.933]).

2

One-Man Grand Jury procedure.[33]

Chapter VII[34]

"**Section 1.** The several circuit courts of this state, the recorders' courts and any court of record having jurisdiction of criminal causes, shall possess and may exercise the same power and jurisdiction to hear, try and determine prosecutions upon informations for crimes, misdemeanors and offenses, to issue writs and process and do all other acts therein as they possess and may exercise in cases of like prosecutions upon indictments" (Mich. Comp. Laws 1929, § 17215 [Mich. Stat. Ann. § 28.941]).

"**Sec. 2.** All provisions of the law applying to prosecutions upon indictments, to writs and process therein and the issuing and service thereof, to commitments, bail, motions, pleadings, trials, appeals and punishments, or the execution of any sentence, and to all other proceedings in cases of indictments whether in the court of original or appellate jurisdiction, shall, in the same manner and to the same extent as near as may be, be applied to informations and all prosecutions and proceedings thereon" (Mich. Comp. Laws 1929, § 17216 [Mich. Stat. Ann. § 28.942]).

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[33]

Michigan Code of Criminal Procedure, chap. 7, §§ 1-6, incl., and § 40 (Michigan. Comp. Laws 1929, §§ 17215-17220 [Mich. Stat. Ann. §§ 28.941-28.946, and 28.980]).

[34]

This chapter is entitled: 'Grand Juries, Indictments, Informations and Proceedings before Trial'.

"**Sec. 3.** Whenever by reason of the filing of any complaint, which may be upon information and belief, any justice of the peace, police judge or judge of a court of record shall have probable cause to suspect that any crime, offense, misdemeanor or violation of any city ordinance shall have been committed within his jurisdiction, and that any person may be able to give any material evidence respecting such offense, such justice or judge in his discretion may, and upon the application of the prosecuting attorney, or city attorney in the case of suspected violation of ordinances, shall require such person to attend before him as a witness and answer such questions as such justice or judge may require concerning any violation of law about which he may be questioned; and the proceedings to summon such witness and to compel him to testify shall, as far as possible, be the same as proceedings to summon witnesses and compel their attendance and testimony, and such witnesses shall be entitled to the same compensation as in other criminal proceedings" (Mich. Comp. Laws 1929, § 17217; [Mich. Stat. Ann. § 28.943]).

"**Sec. 4.** If upon such inquiry the justice or judge shall be satisfied that any offense has been committed and that there is probable cause to suspect any person or persons to be guilty thereof, he may cause the apprehension of such person or persons by proper process and, upon the return of such process served or executed, the justice or judge shall proceed with the case, matter or proceeding in like manner as upon formal complaint. And if upon such inquiry the justice or judge shall find from the evidence that there is probable cause to believe that any public officer, elective or appointive and subject to removal by law, has been guilty of misfeasance or malfeasance of office or wilful neglect of duty or of any other offense prescribed as a ground of

removal, the said justice or judge shall make a written finding setting up the offense so found and shall serve said finding upon the public officer, public board or body having jurisdiction under the law to conduct removal proceedings against said officer. And said finding shall be a sufficient complaint as a basis for removal of said officer and the public officer, public board or public body having jurisdiction of removal proceedings against said officer shall proceed in the method prescribed by law for a hearing and determination of said charge. And in respect of communicating or divulging any statement made by such witnesses during the course of such inquiry, the justice, judge, prosecuting attorney and other person or persons who may, at the discretion of such justice, be admitted to such inquiry, shall be governed by the provisions of law relative to grand jurors" (Mich. Comp. Laws 1929, § 17218 [Mich. Stat. Ann. § 28.944]).

"**Sec. 5.** Any witness neglecting or refusing to appear in response to such summons or to answer any questions which such justice or judge may require material to such inquiry, shall be deemed guilty of a contempt and shall be punished by a fine not exceeding one hundred dollars or imprisonment in the county jail not exceeding sixty days or both at the discretion of the court: Provided, That if such witness after being so sentenced shall appear and answer such question, the justice or judge may in his discretion commute or suspend the further execution of such sentence" (Mich. Comp. Laws 1929, § 17219 [Mich. Stat. Ann. § 28.945]).

"**Sec. 6.** No person shall upon such inquiry be required to answer any questions the answers of which might tend to incriminate him except upon motion in writing by the prosecuting attorney which shall be granted

by such justice or judge, and any such questions and answers shall be reduced to writing and entered upon the docket or journal of such justice or judge, and no person required to answer such questions upon such motion shall thereafter be prosecuted for any offense concerning which such answers may have tended to incriminate him" (Mich. Comp. Laws 1929, § 17220 [Mich. Stat. Ann. § 28.946]).

"**Sec. 40.** All informations shall be filed during term in the court having jurisdiction of the offense specified therein, after the proper return is filed by the examining magistrate by the prosecuting attorney of the county as informant; he shall subscribe his name thereto, and indorse thereon the names of the witnesses known to him at the time of filing the same. Names of other witnesses may be indorsed before or during the trial by leave of the court and upon such conditions as the court shall determine" (Mich. Comp. Laws 1929, § 17254 [Mich. Stat. Ann. § 28.980]).

APPENDIX 'C'

Summary of extradition papers (16-62) on bases of which Governor of New Jersey honored requisition of executive authority of Michigan for surrender of petitioner as fugitive from justice.

Since the extradition papers from Michigan, which formed the bases of her Governor's requisition, cover 44 pages of the printed record (16-62), we deem it useful to submit a short synopsis and abstract of their contents:

1. **Authorization of Michigan's Governor to a designated agent to take Robichaud into custody:** (16)

Governor Kelly of Michigan designates and empowers Leo Van Conant to take Robichaud from the New Jersey authorities and return him to Michigan. Dated, June 5, 1944.

2. **Authentication of the Michigan Warrant** (17):

The Michigan Governor certifies as authentic the Michigan warrant, and requires that Robichaud be arrested and delivered to Van Conant. Dated, June 5, 1944.

3. **Application for Requisition** (18):

The prosecuting attorney for Ingham county, Michigan, applies to the Michigan Governor for a requisition demanding the Robichaud be taken into custody for having committed the crime of conspiracy.

He recommends that Van Conant be designated as the proper agent to return Robichaud to Michigan.

He certifies to the presence of Robichaud in Michigan at the time of the commission of the crime.

He certifies that the proceeding is not instituted to enforce a private claim.

He states that accompanying the application are duly certified copies of the warrant against Robichaud.

He states that accompanying the application are affidavits showing the circumstances of the crime and Robichaud's connection with it.

He states that accompanying the application are affidavits showing Robichaud's presence in Michigan at the time of the commission of the crime.

There is an affidavit accompanying the application showing that Robichaud was in Newark, New Jersey.

Certifies that the officials signing the documents were properly qualified to do so.

Affidavit that the crime was a violation of Michigan laws.

Affidavit showing identification of Robichaud as the person named in the warrant.

This document bears no date.

4. **Affidavit of Charles F. Hemans** (21):

Hemans was a Michigan lawyer who acted as a lobbyist.

He handled various legislative matters for clients relating to certain bills then pending in the Michigan legislature, and among his clients was the Beneficial Management Corporation of Newark, New Jersey, for whom he acted as a lobbyist during the 1939 legislative session.

He personally knew Robichaud, who represented the Beneficial Management Corporation of Newark; that Robichaud came to Lansing, Michigan, and occupied a room in a hotel during the 1939 session.

Robichaud worked with him during the session in behalf of the Newark company, being interested in certain bills then pending before the legislative, particularly Senate Bill 282, which had been referred to committee. He recited the course of action the bill took until its passage and enactment.

He kept Robichaud informed as to the progress of that bill.

He talked frequently with Robichaud and while the bill was in process of enactment.

He made payments of money to various members of the legislature who are named as party defendants in the warrant issued by Judge Carr on May 2, 1944.

He made the payments to influence the named legislators in their vote on the bill.

Part of the money he paid out was furnished by the Newark company.

He discussed these payments from time to time with Robichaud, his discussions with Robichaud taking place in a Lansing hotel.

He informed Robichaud that others besides the Newark company were making contributions to the same legislators in connection with the bill.

Robichaud 'advised' 'counselled with him,' 'conferred with,' and 'assisted' him in carrying out the agreement to pay certain legislators certain sums of money to influence their votes on the bill.

Robichaud arranged with another company, the Household Finance Corporation, for a contribution of $3,200 to be given Hemans to turn over to certain legislators for the same purpose.

Robichaud arranged to have Hemans meet the representative of the Household company, a Julian Thompson, and receive from Thompson the $3,200 in cash.

Hemans received the money from Thompson and paid it to certain legislators.

Hemans consulted Robichaud as to the advisability of paying $500 to a certain member of the legislature, and Robichaud said to him, 'Go ahead, but keep the amount down,' etc.

He discussed with Robichaud from time to time the payment he had made.

He identified Robichaud's photograph.

Date June 1, 1944.

5. **Affidavit of John Danzo** (30):

He was employed as a desk clerk in the Olds Hotel, Lansing, Michigan, in 1939-1940.

In the course of his employment he knew Robichaud, and Robichaud registered as a guest at the hotel during the legislative session of 1939.

He identified Robichaud's photograph.
Dated June 1, 1944.

6. **Certificate of Leland W. Carr** (32):

He is the circuit judge who acted as a one man grand jury.

He certified that 'I have been conducting an inquiry' under the statutes, and that 'as a result of said inquiry there appeared to be probable cause to suspect' that from January 1, 1939 to July 1, 1939, Robichaud unlawfully conspired 'as alleged in a copy of the warrant hereto attached,'' etc.

He certifies that the attached copy of the warrant is a true copy of the criminal warrant on file in his office, and that the copy of the docket entry attached is a true copy of that filed in his office.

On information and belief Robichaud is in Newark.

The purpose of this certification was to aid and secure the rendition of Robichaud to be prosecuted for the crime charged.

He certifies that the proceeding was not instituted to enforce a private claim, but to serve public justice.

Dated June 2, 1944.

7. Warrant (34):

This is another certificate of Judge Carr, who acted as a one-man grand jury, in which he certifies that 'Pursuant to an inquiry conducted' under the statutes in a proceeding entitled, 'In the Matter of Complaint of Herbert J. Rushton, Attorney General for the State of Michigan, for a Judicial Investigation concerning certain Criminal Offenses,' it was made to appear to him that there is probable cause to suspect that certain persons committed criminal conspiracy , as the result of which he issued a warrant for their arrest and requiring that they be brought before him as provided by law, etc.

Dated May 2, 1944.

8. Affidavit of Victor C. Anderson (39):

He is the duly elected prosecuting attorney for Ingham county, Michigan.

It is an indictable offense at common law in Michigan to do the things 'charged against Robichaud' in a 'copy of a warrant attached and made part of' his application for extradition.

He sets up the statute which makes it a felony to commit the violation charged.

Dated June 2, 1944.

9. **Affidavit of Chief of Police** (40):

This is a copy of an affidavit of the Chief of Police of Lansing, Michigan, stating a telegram was received by him from the Newark Chief of Police informing him that Robichaud was arrested and held in Newark awaiting extradition.

Dated June 2, 1944.

10. **Affidavit of Herbert J. Ellison** (42):

He is the treasurer and auditor of the Hotel Olds, in Lansing, in charge of the hotel records.

States that Robichaud's name appears in the hotel records as a guest on 'divers occasions' between January 1 and July 1, 1939.

Robichaud's address in the records appeared as 15 Washington Street, Newark, and that he represented the Beneficial Management Company.

Dated June 2, 1944.

11. **Affidavit of Victor C. Anderson** (43):

This is the prosecuting attorney's affidavit stating that Leo Van Conant (duly authorized agent) is attached to the Michigan State Police, and is authorized to return Robichaud from New Jersey 'in connection with a charge now pending against him' in Ingham county.

12. **Certificate of Flora G. Dewey** (44):

She is the deputy county clerk for Ingham county, and deputy clerk for the circuit court, a court of record with a seal, etc.

She certifies that Victor C. Anderson was the duly elected prosecuting attorney and acted lawfully in such capacity; that his signature to the papers was genuine and made in her presence; that Louis Coash was the properly elected and qualified justice of the peace when he took affidavits, that his signature was genuine, etc.

She certifies that Leland W. Carr was one of the two elected and qualified circuit judges for the 30th judicial district in Michigan and properly acted in that capacity for more than four years prior thereto, and that the signature of Judge Carr on the papers and documents was genuine and made in her presence.

Dated June 2, 1944.

13. **Certificate of Judge Carr** (46):

He certifies that Flora G. Dewey was duly appointed and qualified as deputy county clerk; that she acted in lawful capacity; and that her signature was genuine.

Dated June 2, 1944.

14. **Examination of Charles F. Hemans before Circuit Judge Carr sitting as Examining Magistrate, taken May 31, 1944** (47):

This shows excerpts of testimony given by witness Charles F. Hemans before Circuit Judge Carr on May 29 and May 31, 1944, relating to Robichaud's activities in connection with Senate Bill 282 (Intangible Tax Bill), wherein Hemans stated he received money from Robichaud with which to pay certain legislators.

Attached thereto are various verifications and certifications: to wit, the certification of the court stenographer that he took the stenographic notes (p. 55),

dated June 2, 1944; certification of Judge Carr that the stenographer was the official court stenographer and reporter on June 2, 1944 and his signature was genuine (p. 56), dated June 2, 1944; certification of the Secretary of State that Judge Carr was duly elected as circuit judge and qualified to act in that capacity (p. 57), dated May 29, 1944; certification of the Secretary of State that Victor C. Anderson was the duly elected prosecuting attorney for Ingham county and qualified to act in that capacity (p. 58), dated May 29, 1944; certification of the Secretary of State that Louis Coash was a duly elected justice of the peace and qualified to act as such when he took certain affidavits (p. 59), dated May 29, 1944; certification of the prosecuting attorney that the contents of his application for Robichaud's extradition were true and that he believed Robichaud to be in New Jersey (p. 60).

Dated June 2, 1944.

No. 99

Supreme Court of the United States

OCTOBER TERM, 1947.

ARMAND ROBICHAUD,

Petitioner,

vs.

DANIEL J. BRENNAN, Judge of Essex County Court of Common Pleas, State of New Jersey, *et al.*,

Respondents.

ON APPLICATION FOR CERTIORARI TO THE NEW JERSEY COURT OF ERRORS AND APPEALS.

PETITION FOR REHEARING.

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ON APPLICATION FOR CERTIORARI TO THE NEW JERSEY COURT OF ERRORS AND APPEALS.

PETITION FOR REHEARING.

Petitioner, Armand Robichaud, respectfully prays for a rehearing and reversal of the order hereinbefore entered on the 16th day of October, 1947, denying his petition for writ of certiorari to the Court of Errors and Appeals of New Jersey.

1. The petitioner feels that the important federal questions raised in the courts below have been obscured partly because the questions were not discussed or decided in the opinions below and partly because the petition for certiorari and the briefs filed by both parties stressed collateral and non-federal issues.

2. These questions are: Does the judgment of the New Jersey Court of Errors and Appeals affirming the judgments of the courts below discharging the writ of

habeas corpus erroneously deprive petitioner of his rights under the Fourteenth Amendment of the Federal Constitution in that:

(a) It results in a deprivation of his privilege and immunity as a citizen of the United States to move freely from state to state and not to be forcibly removed from the state of his domicile, except in conformity with the Federal Constitution and the implementing Federal Extradition Statute.

This privilege and immunity arises directly from the Federal Constitution (Article IV, Section 2) and is protected by the privilege and immunity clause of the Fourteenth Amendment.

(b) It also results in a deprivation of his right to insist that prior to any forcible removal from the state of his domicile on an extradition warrant that such warrant and the supporting documents be in conformity with the Federal Constitution and the implementing Statute. This right is "implicit in the concept of well ordered liberty" and is protected by the due process clause of the Fourteenth Amendment.

I hereby certify that the foregoing petition is presented in good faith and not for delay.

THOMAS MCNULTY,
Counsel for Petitioner.